

No. 89-5809-CFH
Status: GRANTED
CAPITAL CASE

Title: Robert Sawyer, Petitioner
v.
Larry Smith, Interim Warden

Docketed:
October 16, 1989

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Hancock, Catherine

Counsel for respondent: Pendergast, Dorothy A.

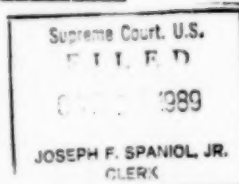
Entry	Date	Note	Proceedings and Orders
1	Oct 16 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 15 1989		Supplemental brief of petitioner Robert Sawyer filed.
5	Nov 16 1989		Order extending time to file response to petition until November 22, 1989.
6	Nov 25 1989		Brief of respondent Interim Warden Smith in opposition filed.
7	Nov 30 1989		DISTRIBUTED. January 5, 1990
8	Jan 3 1990	X	Reply brief of petitioner Robert Sawyer filed.
10	Jan 8 1990		REDISTRIBUTED. January 12, 1990
12	Jan 16 1990		Petition GRANTED. *****
13	Feb 21 1990		Record filed.
		*	certified record and exhibits-USAP 5
14	Feb 23 1990		SET FOR ARGUMENT WEDNESDAY, APRIL 25, 1990. (2ND CASE)
15	Mar 2 1990		Joint appendix filed.
		*	(In 2 volumes)
17	Mar 2 1990		Brief amicus curiae of American Bar Association filed.
18	Mar 2 1990		Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.
21	Mar 2 1990	G	Motion of Stephen H. Sachs, et al. for leave to file a brief as amici curiae filed.
20	Mar 6 1990		Brief of petitioner Robert Sawyer filed.
22	Mar 19 1990		Motion of Stephen H. Sachs, et al. for leave to file a brief as amici curiae GRANTED.
23	Mar 30 1990		CIRCULATED.
24	Apr 5 1990	X	Brief of respondent Interim Warden Smith filed.
25	Apr 5 1990	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.
26	Apr 18 1990	X	Reply brief of petitioner Robert Sawyer filed.
27	Apr 25 1990		ARGUED.

89-5809

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989



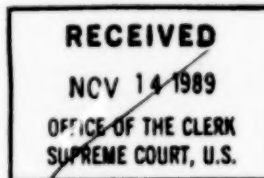
ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.



PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of Caldwell v. Mississippi, which condemns false and misleading prosecutorial arguments to a capital sentencing jury concerning the jurors' responsibility as the final arbiters of death, should be applied retroactively:

a) on the grounds that at the time Caldwell was decided it did not create a "new" rule under the standards of Teague v. Lane and Penry v. Lynaugh.

b) or on the grounds that Caldwell rights belong in the category of fundamental fairness rights that enjoy a special exemption from the non-retroactivity rule of Teague v. Lane.

c) or on both of these grounds?

II. Whether the petitioner should be granted a new sentencing hearing on the grounds that his Eighth Amendment rights were violated because the prosecutor made false and misleading arguments to his capital sentencing jury concerning the jurors' responsibility as the final arbiters of death?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Robert Sawyer, and Robert H. Butler, Sr., Warden of the Louisiana State Penitentiary. After the decision below was rendered on August 15, 1989, Warden Butler resigned his position, and Larry Smith was appointed Interim Warden. Therefore, Interim Warden Smith is named as the respondent in this petition for certiorari by Robert Sawyer.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Robert Sawyer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the proceeding of Sawyer v. Butler on August 15, 1989.

OPINIONS BELOW

The En Banc opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the Appendix to this petition, which is bound separately. The opinion of the panel that was vacated in part by the En Banc Court, reported at 848 F.2d 582 (5th Cir. 1988), and is also reprinted in the Appendix.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana (Mentz, D.J.) has not been reported. The District Court adopted, with modifications, the Magistrate's Findings and Recommendations, which are not reported. Both the District Court opinion and the Magistrate's opinion are reprinted in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, after argument En Banc, was entered on August 15, 1989, affirming the District Court's denial of Robert Sawyer's petition for relief from his conviction, and affirming the District Court's denial of his petition to vacate his death sentence and remand for a new capital sentencing hearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment, which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment, which provides in relevant part:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Louisiana statutes, which are reprinted in the Appendix:

Louisiana Code of Criminal Procedure, Article 905.8

Louisiana Code of Criminal Procedure, Article 905.9

Louisiana Supreme Court Rule 28

STATEMENT OF THE CASE

Robert Sawyer was represented at his trial for first degree murder by an attorney who was unqualified under Louisiana statutory law to defend death penalty cases, and who received \$1,000 for his work. (Habeas Transcript at 114-115, 143.) Robert Sawyer's claims of incompetent representation concerning the work of his counsel at the trial and sentencing hearing are described in the panel opinion. See Sawyer v. Butler, 848 F.2d 582, 588-593 (5th Cir. 1988). Before trial, Robert Sawyer was offered a plea bargain that would have allowed him to plead guilty to murder and to receive a mandatory life sentence, but he declined the plea. (Habeas Tr. at 15.) His co-defendant, Charles Lane, was prosecuted for first degree murder in a separate trial by the same prosecutor who later prosecuted Robert Sawyer. Charles Lane was convicted, and he received a life sentence from his capital sentencing jury. (Trial Transcript at 985-986, A-48-49.)

At the guilt phase of Robert Sawyer's trial for first degree murder, the prosecutor made a closing argument, and defense counsel then stood silent, waving his closing. After the jury returned a guilty verdict on the capital charge, the sentencing hearing was convened, and the presentation of witnesses lasted a little over an hour. (Trial Tr. at 980, A-43.) The prosecutor then gave his closing argument, going first, ahead of defense counsel. The complete text of the closing arguments at the sentencing hearing is reprinted in the Appendix. The prosecutor's arguments included the following statements:

[Following a discussion about the statutory death penalty factors that the prosecutor was presenting to the jury for its consideration:]

That will be a question of fact for the jury to decide. The law provides that if you find one of these aggravating circumstances then what you are doing as a jury, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and

evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation (Trial Tr. at 982, A-45.) (emphasis added)

[Following an argument about how the defendant is to blame for his own situation:]

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and the impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. (Trial Tr. at 984, A-47.) (emphasis added)

[Following a discussion about how the evidence relates to the statutory factors required for the death penalty:]

. . . I think you will decide that there are at least three or four aggravating circumstances which you could reasonably impose in order to justify a death penalty verdict. It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (Trial Tr. at 985, A-48.) (emphasis added)

Following the prosecutor's closing argument, the defense counsel responded with a one-page closing. (Trial Tr. at 985-986, A-48-49.) The prosecutor then returned to make a second closing argument, and stated in conclusion:

[Following an argument about how Robert Sawyer should receive the death penalty even though his co-defendant, who was tried separately, received a life sentence:]

There is only one verdict that can be rendered in this case and there will be a strong symbolism related to that penalty. You the people are part of the criminal justice system. You now know how it works. Now is the time and I ask you that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend the death penalty. (Trial Tr. at 989-990, A-52-53.) (emphasis added)

The jury then received its instructions, and after deliberations returned a sentence of death, on September 19, 1980. This death sentence was binding on the trial court under Louisiana law. See La. Code Crim. P., Art. 905.8.

Robert Sawyer was represented on appeal by different counsel, and after his conviction and sentence were affirmed by the Louisiana Supreme Court, present counsel entered the case and filed a petition for certiorari. This Court summarily vacated the judgment of the Louisiana Supreme Court, and remanded with instructions for that court to reconsider its ruling in light of Zant v. Stephens, 462 U.S. 862 (1983). See State v. Sawyer, 422 So.2d 95 (La. 1982), vacated and remanded, 463 U.S. 1223 (1983). On remand, the Louisiana Supreme Court affirmed the conviction and sentence, and Robert Sawyer's conviction became final on April 2, 1984. See Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983), cert. denied, 466 U.S. 931 (1984). On May 8, 1984, Robert Sawyer filed a state habeas corpus petition, which included twenty claims. Among them was a claim that was soon to be known as a "Caldwell" claim, namely that Robert Sawyer's Eighth and Fourteenth Amendment rights were violated because the prosecutor's sentencing phase argument injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence. (State Habeas Petition, Claim V, at 12.) The state trial court denied the petition on the same day it was filed, without opinion. On appeal, the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The trial court denied the petition again at the close of the hearing, without opinion. The Louisiana Supreme

Court affirmed the trial court's ruling, 4-3, without opinion. See Sawyer v. Maggio, 479 So.2d 360, reconsideration denied, 480 So.2d 313 (La. 1985).

Having exhausted his state remedies, Robert Sawyer filed a federal habeas corpus petition, with eighteen claims, on January 20, 1986. The district court judge assigned the petition to a magistrate, who rejected all the claims in an unpublished opinion of "Findings and Recommendations." (A-91-140.) In federal court, Robert Sawyer's Eighth Amendment claim concerning false and misleading prosecutorial argument about the jury's role as a final arbiter of death was labelled a "Caldwell" claim. See Caldwell v. Mississippi, 472 U.S. 320 (1985) (decided on June 11, 1985). While the magistrate found that the prosecutor's arguments "dangerously approach[ed] reversible error," he also found that the "standard to be employed in determining whether prejudice resulted" from the arguments "is the 'reasonable probability' test for determining prejudice established by Strickland v. Washington [466 U.S. 668 (1984)]," which was not satisfied. (Magistrate's Findings at 33, 36, A-123, 126.) Judge Mentz affirmed the magistrate's findings and recommendations in an unpublished order, and granted Robert Sawyer's request for a certificate of probable cause to appeal. See Sawyer v. Butler, 848 F.2d at 586-587.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision denying relief. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). The panel rejected Robert Sawyer's claims of ineffective assistance of counsel and denial of due process and equal protection from his representation by a trial attorney unqualified to represent capital defendants under state law. The panel divided over the resolution of the Caldwell claim, with the majority rejecting the claim on the grounds, among others, that Caldwell's "no effect" test should not be applied. See Sawyer, 848 F.2d at 599 n.15. Judge King dissented, and would have vacated the sentence and granted a new sentencing hearing because she found the Caldwell claim was valid. Sawyer, id. at 599-606. The

Court of Appeals granted rehearing En Banc on August 25, 1988, to consider the question whether Caldwell was violated in Robert Sawyer's case. Sawyer, 848 F.2d at 606.

After oral argument in the case, the En Banc Court requested supplemental briefs from counsel on March 30, 1989, concerning three questions arising from this Court's decision in Teague v. Lane, 109 S. Ct. 1060 (1989). (See Letter in Appendix at A-41-42.) One of these questions, "Does Teague apply to collateral attacks upon a sentencing proceeding in a capital case?", was answered in the affirmative by this Court, one month after supplemental briefs were submitted to the En Banc Court. See Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989). The other two issues remain questions of first impression in this Court's jurisprudence: "Does Caldwell articulate a rule that is new within the meaning of the Teague test?" and "Does Caldwell announce a rule that falls within the fundamental fairness exception to the Teague rule?"

The En Banc Court issued its opinion on August 15, 1989, and divided sharply over these two Teague issues. Judge Higginbotham wrote for a majority of nine judges who found that Caldwell is "new" law and does not fall within Teague's fundamental fairness exception to its rule of non-retroactivity, so that Robert Sawyer's Caldwell claim is barred by Teague. Sawyer v. Butler, No. 87-3274, slip op. at 5528 (5th Cir. Aug. 15, 1989) (A-1-27). Judge King authored a dissent for five judges who would have found that Caldwell should be applied retroactively to Robert Sawyer's case, both on the grounds that it was not "new" law at the time it was decided, and on the grounds that Caldwell falls within Teague's fundamental fairness exception. Sawyer, slip op. at 5554-5567 (A-27-40). Judge King noted that if Robert Sawyer's case had been decided "on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted . . . the majority opinion would have granted him a new sentencing hearing." Id. at 5567 (A-40). Judge Rubin expressed his concurrence with the views of the dissent, but did not vote. Sawyer, slip op. at 5530 n.1 (A-3).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S REFUSAL TO APPLY CALDWELL v. MISSISSIPPI RETROACTIVELY IS BASED ON ERRONEOUS INTERPRETATIONS OF THE STANDARDS FOR "NEW" LAW CLAIMS AND CLAIMS RELATED TO "FUNDAMENTAL FAIRNESS" ESTABLISHED IN PENRY v. LYNAUGH AND TEAGUE v. LANE. UNLESS REVERSED, THE FIFTH CIRCUIT'S RULING WILL CREATE BROAD NON-RETROACTIVITY DOCTRINE THAT WILL BAR DEATH ROW DEFENDANTS FROM RECEIVING HABEAS CORPUS RELIEF BASED ON MERITORIOUS EIGHTH AMENDMENT CLAIMS.

In Robert Sawyer's case, a sharply divided Fifth Circuit En Banc Court disagreed over the meaning of this Court's definition of "new" death penalty decisions that are not retroactive under Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The majority held that the Supreme Court made "new" law when it condemned a prosecutor's false and misleading argument about the non-finality of a jury's death verdict in Caldwell v. Mississippi, 472 U.S. 320 (1985). The Fifth Circuit's decision should be reviewed by this Court because the majority expressed the need for guidance on this question, and because Sawyer creates a blueprint for "new" rules that conflicts in several respects with the retroactivity standards established by this Court in Penry and in Teague v. Lane, 109 S. Ct. 1060 (1989).

The Fifth Circuit also divided sharply over the question whether Caldwell deserves retroactive application because it qualifies under Teague as a case involving "bedrock procedural elements" of "fundamental fairness." The majority's refusal to treat Caldwell rights as "bedrock" elements of procedural fairness in death penalty cases should be reviewed because no Supreme Court decision has addressed the question involved here: When does an Eighth Amendment sentencing right involve a procedure "without which the likelihood of an accurate" death sentence "is seriously diminished" under Teague? The Fifth Circuit majority expressed a need for guidance on this question, and all federal courts are in immediate need of guidance, because almost all Eighth Amendment rights established since 1972 need to be assigned a retroactivity status as soon as possible. Of all the cases that may raise this question,

Sawyer deserves this Court's review because the Fifth Circuit majority construes Teague so narrowly as to make it unlikely that any Eighth Amendment rights will be held to be "bedrock" rights.

Finally, this Court should review Robert Sawyer's case because the Fifth Circuit's interpretation of Caldwell is based on the misapprehension that it does not derive from the Eighth Amendment cases of Woodson v. North Carolina, 428 U.S. 280 (1976), Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), as expressly stated in the Caldwell opinion. This misapprehension explains the Fifth Circuit's failure accurately to apply the "new" law analysis of Penry, as well as its failure to recognize the "bedrock" nature of Caldwell rights. While Caldwell violations are rare, they must be treated as cause for new sentencing hearings because they pose a unique threat to the reliability and public legitimacy of death verdicts. This Court is committed to the view that no prosecutor can tell a jury that it can impose a death sentence because an appellate court will "correct any 'mistake' the jury might make in a choice of sentence." Caldwell, 472 U.S. at 343, 348 (Rehnquist, J., dissenting). The Fifth Circuit's failure to appreciate the origin and scope of Caldwell rights justifies this Court's review of the majority's standards governing the assessment of Caldwell claims on the merits.

A. THIS COURT SHOULD REVIEW THE FIFTH CIRCUIT'S DEFINITION OF "NEW" EIGHTH AMENDMENT RULES BECAUSE IT DOES NOT ACCORD WITH THE GUIDELINES FOR "NEW" RULE ANALYSIS ESTABLISHED IN PENRY v. LYNAUGH AND TEAGUE v. LANE.

The Fifth Circuit majority's opinion reveals three missteps that produce its flawed interpretation of "new" law analysis under Penry and Teague, which leads it to find Caldwell to be non-retroactive. Its first error is to elevate the earlier Teague plurality opinion over the later Penry majority opinion as the most relevant guide to retroactivity doctrine, despite the fact that both cases say that "new" law is created when the Court imposes new obligations on the states,

breaks new ground, or reaches decisions not dictated by precedents. Sawyer, slip op. at 5545 (A-18). The Fifth Circuit majority finds that Penry "left the definition of a 'new rule' in some doubt," and that the "opinions in Teague and Penry do not immediately yield a clearly articulable definition of a 'new rule.'" Sawyer, id. The majority's uncertainty finds its source in Justice Scalia's dissent in Penry, which proves "significant" for determining that Penry's application of "Teague's 'new rule' formula may well have turned upon facts" unique to Penry's claims. Sawyer, id. Thus, even though Penry provides the more detailed blueprint for "new" law analysis, the Fifth Circuit determines that it constitutes merely a "special case, one simply reapplying" an earlier case "to a unique development in state law." Sawyer, slip op. at 5548 (A-21). Thus, Penry provides no guidance for resolving the question of Caldwell's retroactivity.

Supreme Court review is needed when a circuit court rejects the applicability of a Supreme Court majority opinion because a dissent suggests that it is inconsistent with an earlier plurality opinion. As the Sawyer majority puts it, once a circuit court perceives such a conflict between Teague and Penry, whether justifiably or not, "only Teague's authors can tell us if they meant what they said or if they have changed their minds." Sawyer, slip op. at 5554 (A-27). Five members of the Fifth Circuit perceive the majority's decision to minimize the significance of Penry differently:

[T]he majority's dispute is not, in reality, with our interpretation of Teague, but with Penry's elaboration of the 'new rule' standard [T]he majority ignores the fact that Teague's authors have already spoken in Penry and have effectively rejected any definition of a 'new rule' that would sweep broadly enough to encompass Caldwell. (emphasis in original)

Sawyer, slip op. at 5559-5560 (A-32-33) (King, J., dissenting). Supreme Court resolution of this dispute between the two sides of the Fifth Circuit is important, because the retroactivity of almost all Eighth Amendment rights in this Circuit now depends upon it.

The Fifth Circuit majority's decision to treat Penry as a case that provides no general guidance about retroactivity leads it to make a second misstep. It fails to note that Penry directs lower courts to examine if and how "well-established principles" in Supreme Court cases evolve towards the ultimate development of the rule in question, here the Caldwell ban on false and misleading prosecutorial argument about jury responsibility for death verdicts. See Penry, 109 S. Ct. at 2944, 2944-2947. According to the text of the Caldwell opinion itself, this Court applied specific principles from earlier cases to the problem of the unique kind of prosecutorial argument that seeks to minimize a jury's awesome responsibility for death. Those "root" cases include Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1978), Gardner v. Florida, 430 U.S. 349 (1977), Woodson v. North Carolina, 428 U.S. 280 (1976), and McGautha v. California, 402 U.S. 183 (1971). Compare Sawyer, slip op. at 5549-5550 (A-22-23) (mischaracterizing petitioner's arguments that Caldwell is old law by omitting mention of his argument that Caldwell's rule is derived from earlier cases) with Petitioner's Original Circuit Brief at 36, Petitioner's Original Circuit Reply Brief at 12, Petitioner's Supplemental Circuit Brief at 15-19, Petitioner's Supplemental Circuit Reply Brief at 3-7. For citations to earlier "root" cases in Caldwell, see 472 U.S. at 323, 329, 329 n.2, 330, 333, 340, and see id. at 341, 343 (O'Connor, J., concurring).

If the Fifth Circuit majority had looked to the Penry opinion, it would have discovered a strong resemblance between the evolution of specific principles that culminated in the Penry rule, and that which culminated in Caldwell. The Woodson principle that reliable death verdicts require consideration of individualized mitigating circumstances led to Lockett's principle that a jury may not be barred from considering such circumstances by statute, and on to Eddings' principle that such a bar may not be erected through the decision or instruction of a trial judge. See Penry, 109 S. Ct. at 2946. Under Eddings, if no judge could tell the jury that mitigating circumstances could be ignored, then surely no prosecutor could do

so either. Under Penry no "new" law is created when the Woodson-Lockett-Eddings principles are applied to hold that the affirmative obligation to remove bars to mitigating circumstances encompasses the obligation to create methods such as jury instructions to permit juries to "give effect" to such evidence. See Penry, 109 S. Ct. at 2945-2947. Under Caldwell, no "new" law was made when prosecutors were condemned for making false and misleading arguments about the non-finality of a jury's death verdict because those arguments create the danger that the jury will not exercise its duty to give full consideration to mitigating circumstances in making individualized decisions about death. See Caldwell, 472 U.S. at 330-333. Cf. Sawyer, slip op. at 5557-5559 (A-30-32) (where dissent describes Caldwell's roots in these Woodson-Lockett-Eddings principles, as well as in other supporting principles).

By ignoring Penry's model for measuring whether "well-established constitutional principle[s]" are being applied "to govern a case which is closely analogous to those which have been previously considered," the Fifth Circuit majority is able to overlook all Eighth Amendment cases between 1974 and 1985 that supply the roots of Caldwell. Penry, 109 S. Ct. at 2944. Instead, the court reaches back to a 1974 case establishing a modest level of federal court scrutiny of ordinary prosecutorial misconduct in state criminal cases. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Donnelly then supplies the majority's only case law authority for finding Caldwell to be a "new" rule. But the majority poses the wrong question when it asks, "whether the changes [from Donnelly to Caldwell] suffice to make Caldwell a new rule . . . ?" Sawyer, slip op. at 5549 (A-22). See also id. at 5537 (A-10) (stating the wrong proposition that "[w]hether Caldwell is a new rule" depends "upon the relation between Caldwell and Donnelly"). According to Penry, the proper question is whether Caldwell's rule evolved from principles established in closely analogous Eighth Amendment decisions rendered during the last two decades. If the Fifth Circuit majority's "new" law reasoning is adopted, then any Eighth Amendment ruling like Caldwell can be

found to be "new" law through the simple expedient of finding a non-Eighth-Amendment case from an earlier era, and noticing how new a given Eighth Amendment case is by comparison to that earlier case. Neither Teague nor Penry support such an approach to "new" law analysis.

Finally, the third misstep of the Fifth Circuit majority occurs when it reads Teague as requiring the adoption of a radically new element in "new" law analysis. First, the majority reads Teague as rejecting the idea that a uniform body of state court practices and constitutional holdings should be considered when deciding whether a Supreme Court rule that ratifies these holdings is "old" law. See Sawyer, slip op. at 5548-5549 (A-21-22) (finding that Teague's citation, without comment, of Ford v. Wainwright, 477 U.S. 399 (1986), demonstrates that state court anticipation of Caldwell's rule is irrelevant). This proposition is not explicitly established in Teague, and it contradicts the well-established relevance of state court practice to "new" law analysis. Rules that break new ground include not only those that overrule earlier cases, but also those that do not ratify a strong state consensus supporting a particular interpretation of well-established principles. See, e.g., Solem v. Stumes, 465 U.S. 638, 647-64 (1984). In the case of Caldwell's rule, both the "fair trial" state court decisions between 1877 and the present, and the Eighth Amendment state court decisions in the post-Furman era, provide overwhelming evidence that state courts endorsed a ban on false and misleading prosecutorial argument about the non-finality of a sentencing jury's role. Furman v. Georgia, 408 U.S. 238 (1972). See cases cited in Petitioner's Supplemental Circuit Brief at 10-12; see cases cited in Caldwell, 472 U.S. at 334 n.4-5. Compare Sawyer, slip op. at 5549 (A-22) (asserting that all post-Furman state cases adopting Caldwell rules in the pre-Caldwell era are based solely on "state law" that could not create "federal jurisdiction") with id., slip op. at 5560-5562 (A-33-35) (where dissent notes that such cases are based on state court readings of their obligations under Gregg v. Georgia, 428 U.S. 153 (1976)). See also La. Code Crim. P., Art. 905.9 and La. Supreme Court Rule 28.

As Penry and Teague make clear, the chief concerns of retroactivity doctrine are making sure that states are not unfairly burdened with obligations they cannot reasonably anticipate, and creating an incentive for state courts "to conduct their proceedings in a manner consistent with established constitutional principles." Teague, 109 S. Ct. at 1073. See Penry, 109 S. Ct. at 2947-2949 (describing how states may be asked to fulfill general Eighth Amendment obligations imposed upon them in specific terms that are supported by well-established principles). The Fifth Circuit concludes that "a rule is new for purposes of Teague if it has not been accepted at the time the petitioner's conviction became final." Sawyer, slip op. at 5550 (A-23). This ruling creates such a broad definition of "new" law that it fails to provide incentives for state courts to read this Court's Eighth Amendment opinions with attention to the principles they contain.

Given the Fifth Circuit majority's admitted uncertainty about the validity of its interpretation of Teague and Penry, this Court should review Robert Sawyer's case in order to clarify the "new" law standards for this circuit and for others. Disagreements about the meaning of these standards are arising already in other circuits. See Moore v. Zant, No. 84-8423 (11th Cir. Sept. 28, 1989) (en banc) 1989 WL 112653. 'Death row defendants in other circuits continue to enjoy the benefits of receiving resolutions of Caldwell claims on the merits, while Robert Sawyer has been barred from relief. See Buttrum v. Black, ___ F. Supp. ___ (N.D. Ga. Sept. 28, 1989) 1989 WL 108092 (granting Caldwell relief). See also Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989), vacated for rehearing en banc, March 23, 1989, argued May 9, 1989 (considering question whether Caldwell should be given retroactive effect under Teague and Penry). This Court's pending decision in Butler v. McKellar should provide some guidance on the concepts of "new" and "old" law. See Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988), cert. granted, sub nom. Butler v. McKellar 109 S. Ct. 1952 (1989) (certiorari granted to determine whether Arizona v. Roberson, 108 S. Ct. 2093 (1988) is "new" law).

But the Fifth Circuit majority's decision in Sawyer still deserves this Court's review because its exclusion of Caldwell rights from the category of "bedrock" procedural elements under Teague is a ruling that should receive reconsideration in its own right.

B. WHEN CALDWELL RIGHTS ARE VIOLATED, THE LIKELIHOOD OF AN ACCURATE DEATH SENTENCE IS SERIOUSLY DIMINISHED UNDER TEAGUE v. LANE. THEREFORE THIS COURT SHOULD REVIEW THE FIFTH CIRCUIT'S REFUSAL TO TREAT CALDWELL v. MISSISSIPPI AS A DECISION INVOLVING A "FUNDAMENTAL FAIRNESS" RIGHT ENTITLED TO RETROACTIVE EFFECT UNDER TEAGUE.

In Sawyer the Fifth Circuit majority attempts to create a standard to answer the question that was not answered in either Penry or Teague: When does an Eighth Amendment sentencing right qualify under the "fundamental fairness" exception to Teague's non-retroactivity rule, because it involves a procedure "without which the likelihood of an accurate" verdict "is seriously diminished"? See Teague, 109 S. Ct. at 1077. The majority decides to treat as "fundamental" only those rights that:

either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's Caldwell claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second Teague proviso.

Sawyer, slip op. at 5553 (A-26).

There are two reasons that this definition of retroactive "fundamental fairness" rights under Teague deserves review by this Court. First, the Fifth Circuit majority indicates that it is uncertain about the propriety of this definition, and that it welcomes this Court's guidance. While the majority finds that "pending further direction from the Supreme Court . . . we must follow the course set by the [Teague] plurality as best we can," it also notes that "it is not clear how Caldwell, with its condemnation of a particular type of jury

argument, fits into the Teague scheme." Sawyer, slip op. at 5550, 5551 (A-23-24). Additionally the majority notes the difficulties in translating Teague's exception, which is couched in the language of rules that diminish the "likelihood of an accurate conviction," into the death verdict context. "Our task is made difficult by the newness of the amalgam [of applying Teague to death verdicts] as well as its uncertain precedential footing." Sawyer, slip op. at 5551 (A-24). Nonetheless, the majority concludes that a fair translation can be accomplished by requiring habeas petitioners to show that the relevant procedure is one "without which the correctness of the jury's decision to punish by death rather than by life imprisonment is seriously diminished." Id.

It is vital for this Court to address the meaning of Teague's concept of "fundamental fairness" in the death sentencing context, because almost all Eighth Amendment rights established since 1972 need to be assigned a retroactivity status under Teague as soon as possible. See List of Death Penalty Cases Since Witherspoon v. Illinois, 391 U.S. 510 (1968) (A-144). Assuming that the Sawyer majority has performed a reasonable translation of Teague's conviction-based definition into the death penalty context, it remains important for this Court to review the Fifth Circuit's translation of Teague, out of all the cases that will raise the "fundamental fairness" question in the coming months. This is because the Fifth Circuit majority created a further translation of Teague to require an Eighth Amendment procedural right to have an "overwhelming influence" upon the accuracy of a death verdict, instead of the more moderate Teague requirement that accuracy be "seriously diminished" by the violation of the right. Sawyer, slip op. at 5553 (A-26).

While appropriate definitions of "fundamental fairness" rights may exist on a spectrum, the Fifth Circuit's definition is certainly at one end of that spectrum. This makes it difficult for any court using that definition to remain flexible, and to make case-by-case determinations of the qualities of particular Eighth Amendment

rights. In addition, the Fifth Circuit's definition retains a focus on "factual innocence" that has no evident bearing upon Eighth Amendment sentencing hearing rights like Caldwell. It also appears to suggest that some defendants' Caldwell claims may qualify for retroactive application while claims of other defendants do not. This result clearly contradicts Teague's description of "fundamental fairness" analysis. See Sawyer, slip op. at 5565 (A-38) (dissent noting that "[u]nder Teague, we must address the nature of Caldwell error, not the specific facts of Sawyer's case"). Unless this Court reviews the Fifth Circuit's special version of Teague's non-retroactivity exception, very few Eighth Amendment rights, if any, can be expected to receive retroactive treatment in future Fifth Circuit cases.

The second reason that this Court should review the Fifth Circuit's Teague interpretation is that it is not only extreme, it is wrong, as applied to Caldwell. Both the text of the Caldwell opinion, and that of the Teague opinion as well, reveal that Caldwell fits comfortably within the parameters of rights that "seriously diminish" the accuracy of death verdicts. The Caldwell Court repeatedly emphasized the dangers of unreliability posed by uncorrected arguments that suggest in false and misleading ways that the jury is not the ultimate arbiter of death. See Caldwell, 472 U.S. at 329-333, 340-341; see id. at 341, 342, 343 (O'Connor, J., concurring). The Teague plurality notes that "bedrock" procedural elements deserving retroactive application will usually include elements that have already "emerged," and Caldwell's fundamental nature emerged and was recognized in many states between 1877 and 1985. See Teague, 109 S. Ct. at 1077; see Petitioner's Supplemental Circuit Brief at 6-29. Moreover, if the Teague plurality regards a rule as "bedrock" that prohibits the prosecutor from knowingly making use of perjured testimony, then it should regard Caldwell's ban on knowingly making use of false and misleading arguments about the non-finality of a jury's death verdict as "bedrock" as well. See Teague, 109 S. Ct. at 1077.

Instead of relying on the Caldwell and Teague opinions, the Fifth Circuit majority relies for its Teague interpretation almost exclusively on Dugger v. Adams. See Sawyer, slip op. at 5552-5553 (A-25-26), citing Adams, 109 S. Ct. 1211 (1989). Yet the Adams Court simply refused to create a per se exception for Caldwell claims to the rule that procedural default will bar habeas relief, and insisted instead that the "fundamental miscarriage of justice" exception to procedural defaults should be applied on a case-by-case basis. See Adams, 109 S. Ct. at 1217-1218 n.6. Procedural default doctrines cannot be used to provide the substance for answers to retroactivity questions because the two fields are animated by different concerns. Procedural default doctrines must be written so as to create strong incentives for counsel to raise objections to all errors in state court. Retroactivity doctrines focus instead upon the expectations of the state courts themselves concerning the constitutional standards that will be applied to them. Where state courts can reasonably anticipate that well-established principles will be used to create "old" law like Caldwell, or that "bedrock" rights like Caldwell will be endorsed by the Supreme Court, then state courts can live with the prospect of retroactive application of Caldwell rights.

The Fifth Circuit's interpretation of Teague, both regarding its "new" law analysis and its "fundamental fairness" exception, is distorted because of the majority's assumption that Caldwell derives from Donnelly rather than from its Eighth Amendment predecessors. The majority's interpretation of Caldwell deserves this Court's review not only because of the problems it creates for retroactivity doctrine, but also because it misconstrues the scope and meaning of this Court's holding in Caldwell itself.

C. ROBERT SAWYER'S PROSECUTOR VIOLATED CALDWELL v. MISSISSIPPI, AND THIS COURT SHOULD REVIEW THIS EIGHTH AMENDMENT CLAIM ON THE MERITS BECAUSE THE FIFTH CIRCUIT'S STANDARDS FOR SUCH CLAIMS DO NOT ACCORD WITH THOSE OF THE CALDWELL DECISION.

It is rare for a prosecutor to commit Caldwell error, and rare

for a defendant to be able to satisfy this Court's burden of proof for such an error. In order to receive a new sentencing hearing, a defendant must show that the prosecutor's statements: a) were focused on the subject of the non-finality of the jury's decision; b) were false and misleading; c) were focused, unambiguous and strong; and d) were uncorrected by the trial judge. See Caldwell, 472 U.S. at 320, 340 & n.7; see id. at 341, 342, 343 (O'Connor, J., concurring). Thus it is not surprising that in over a dozen Caldwell cases decided by the Fifth Circuit since 1985, only one defendant was granted a new sentencing hearing on the basis of a Caldwell violation. See Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986). The five Fifth Circuit dissenters in Sawyer concluded that the prosecutor's violation of Caldwell in this case is clear. Sawyer, slip op. at 5555-5556 (A-28-29). The dissenters also note that if Robert Sawyer's case had been decided without regard to this Court's recent retroactivity cases, "the majority opinion would have granted him a new sentencing hearing." Id. at 5567 (A-40). The justifications for such conclusions are apparent from the record of the prosecutor's argument.

In four separate episodes in closing argument, the prosecutor informed the jurors that their job was merely to make a "recommendation," or to take an "initial step" that many courts would review, and that the jurors should not "feel like you are the one" making the death penalty decision. See Trial Tr. at 982-989 (A-45-52); Sawyer, slip op. at 5531-5532 & 5532 n.3 (A-4-5); id. at 5555-5556 (A-28-29) (King, J., dissenting). This prosecutor's argument was even worse than the one in Caldwell, where the prosecutor focused on "reviewability" alone. See Caldwell, 472 U.S. at 325-326. Here the prosecutor focused on the power of appellate courts both to review and to correct the jurors' death verdict, telling them:

That is not so [that you are pulling the switch].
It is not so and if you are wrong in your decision
believe me, believe me there will be others who
will be behind you to either agree with you or
to say you are wrong

(Trial Tr. at 985, A-48.) These remarks were preceded by earlier

episodes of argument that made it clear just who the "others" were who would correct the jury's death verdict, namely the appellate courts. As Judge King noted in her dissent from the panel opinion:

[T]he prosecutor here made several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. . . .
. . . . The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination.

Sawyer, 848 F.2d at 599, 605. Cf. Caldwell at 472 U.S. at 343, 348 (Rehnquist, J., dissenting) (if the prosecutor argues to a jury that "the appellate court would correct any 'mistake' the jury might make in choice of sentence" and if the trial judge does not correct such an argument, "I might well agree [that this does not comport with] some constitutional norm related to procedural fairness").

After applying Caldwell retroactively to Robert Sawyer's case, this Court should find that an Eighth Amendment violation was committed by Robert Sawyer's prosecutor. In doing so, this Court should not rely on the Fifth Circuit majority's standards for Caldwell violations, but on its own rules expressed in the Caldwell opinion. For while some portions of the Fifth Circuit majority's opinion adhere to this Court's standards, other portions do not. Two examples are illustrative. First, the Caldwell Court made clear that a trial court's "correction" could not be found to have occurred fortuitously through the utterance of some boilerplate references to the jury's role, appearing in part of the jury instructions that are unconnected to the prosecutor's improper arguments about non-finality. See Caldwell, 472 U.S. at 340 n.7 (describing how general statements by the trial judge or prosecutor about juror responsibility cannot be treated as adequate "correction" because they do not retract or even undermine the erroneous assertions that the jury's verdict "would be reviewed by the appellate court to determine its correctness"). As Justice O'Connor put it, correcting statements must "correct the impression that the appellate court would be free to reverse the death sentence

if it disagreed with the jury's conclusion that death was appropriate." Caldwell, 472 U.S. at 341, 343 (O'Connor, J., concurring). Compare Sawyer, slip op. at 5544 (A-17), (noting erroneously that boilerplate instructions about the "judge [being] the sole source of the law" or the "lawyers' arguments [not being] evidence" are relevant to determining Caldwell error) with Caldwell, 472 U.S. at 343, 344, 345, 346, 349 (Rehnquist, J., dissenting) (revealing that the Caldwell Court ignored a variety of general statements about responsibility made by the judge, prosecutor, and defense counsel, including statements that the jurors were the sole judges of the facts, and the lawyers' arguments were not evidence).

A second example of the Fifth Circuit majority's use of a standard that is inconsistent with Caldwell is its statement that Caldwell views prosecutorial argument as a basis for reversal "if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding." Sawyer, slip op. at 5553 (A-26). This standard is similar to the Caldwell dissent's approach, which argued that bad prosecutorial argument could be regarded as harmless in light of a reading of the transcript of the entire trial. See Caldwell, 472 U.S. at 343, 343-352 (Rehnquist, J., dissenting). While this standard is the appropriate one for assessing ordinary prosecutorial misconduct, this Court expressly rejected this approach in Caldwell. See also Darden v. Wainwright, 477 U.S. 168, 183-184 n.15 (1986) (reaffirming that Caldwell standards are different from Donnelly-Darden standards because Caldwell addresses the unique harm that occurs when a jury is misled "into thinking that it [has] a reduced role in the sentencing process").

Thus, if this Court should decide to review Robert Sawyer's case, it should review not only the question whether Caldwell is retroactive, but also review the question whether there was a Caldwell violation on the merits. If this Court decides to give retroactive effect to Caldwell, it should also find, as the Fifth Circuit

dissenters did, that Robert Sawyer's Eighth Amendment rights were violated by the prosecutor's argument here. While Caldwell error is rare, a prosecutor occasionally will be tempted deliberately to commit errors such as Caldwell violations, even in a case he or she expects to win. See Jonakait, The Ethical Prosecutor's Misconduct, 23 Crim. L. Bull. 550 (1987). See also State v. Lindsey, 404 So.2d 466, 481-488 (La. 1981) (where Robert Sawyer's prosecutor was condemned for remarks that were held to be reversible misconduct). Caldwell violations must be condemned when they occur, because they pose a unique threat to the reliability and public legitimacy of death penalty verdicts. Robert Sawyer should be given a new sentencing hearing so that the decision whether he should die will be put to a jury that is not misled about its responsibilities.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 13, 1989

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

CERTIFICATE OF SERVICE

I, Catherine Hancock, a member of the Bar of this Court, hereby certify that on this 13th day of November, 1989, a copy of the corrected Petition for a Writ of Certiorari in the above-entitled case (the original Petition having been filed and docketed on October 16, 1989) was mailed, first-class postage prepaid, to William J. Guste, Attorney General of Louisiana, State Capitol Station, P.O. Box 44005, Baton Rouge, Louisiana 70804, and to Ms. Dorothy Pendergast, Office of the District Attorney, 24th Judicial District Court, New Courthouse Building, Gretna, Louisiana 70054, counsel for the respondent herein. I further certify that all parties required to be served have been served.

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3

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SAWYER v. BUTLER 5528

Robert SAWYER, Petitioner-Appellant,
v.

Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

No. 87-3274.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1989.

State prisoner sought habeas corpus. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., denied relief and defendant appealed. The Court of Appeals, 848 F.2d 582, affirmed. On petition for rehearing, the Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) claim that prosecutor's closing argument misled the jury as to its responsibility for imposition of the death penalty could not be raised in federal habeas corpus proceeding with respect to conviction which occurred prior to the United States Supreme Court *Caldwell* decision, and (2) argument did not violate the fundamental fairness restriction of *Donnelly*.

Affirmed.

King, Circuit Judge, filed a dissenting opinion in which Reavley, Politz, Johnson, and Jerre S. Williams, Circuit Judges, joined and to which Alvin B. Rubin, Senior Circuit Judge, viewing himself ineligible to participate following conference, adhered.

1. Habeas Corpus ¶791

Habeas corpus petitioners are precluded from seeking to overturn their conviction

on the basis of rules which are new by comparison with the date their convictions became final.

2. Habeas Corpus ¶791

Habeas corpus petitioner may rely upon a rule which is new in comparison to his conviction if it would place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or would exempt certain persons entirely from capital punishment, or when the new rule requires observance of those procedures which are implicit in the concept of ordered liberty.

3. Habeas Corpus ¶794

Court would consider merits of petitioner's interpretation of Supreme Court opinion issued after his conviction before determining whether he could rely on that opinion to overturn his sentence of death.

4. Criminal Law ¶1208.1(6)

Sentencing jury must feel the weight of responsibility in imposing death sentence so long as it has responsibility; lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role; for jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of jury function.

5. Criminal Law ¶977(1)

Whether jury or judge decides sentence, responsibility to decide must be adjoined to the power to decide.

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6. Criminal Law ¶713, 1171.1(6)

State cannot resist conclusion that it improperly diminished jury's sense of responsibility in its sentencing role with the argument that jury with such a diminished responsibility nonetheless did not render the proceedings fundamentally unfair.

7. Criminal Law ¶728(1), 730(1)

Absence of objection and absence of trial judge's participation with respect to prosecutor's argument which diminishes jury's responsibility for imposing the death penalty are relevant to the question of whether the jury was misled, but their absence is not determinative as a matter of law of the question of whether the state did mislead the jury.

8. Criminal Law ¶713

Prosecutor's statements to the jury which accurately describe its role in the imposition of the death penalty will not support a claim that the jury's sense of responsibility has been improperly diminished, but a statement can be literally true but quite misleading, such as by failing to disclose information essential to make that which is not said not misleading.

9. Criminal Law ¶1030(1)

Essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection.

10. Habeas Corpus ¶774

Whether to insist upon contemporaneous objection as a matter of orderliness is a matter for the state court.

11. Jury ¶117

Timely objection is an essential element of a claim of racial discrimination in the exercise of peremptory challenges.

12. Criminal Law ¶1208.1(6)

Although prosecutor's argument will often be the natural point of departure in considering whether jury's sense of responsibility for imposition of death penalty has been improperly diminished, court must also look to opposing argument and to the instructions of the court, both in its formal charge and in any rulings on objections.

13. Criminal Law ¶1208.1(4, 6)

In determining whether jury's sense of responsibility for imposition of death penalty has been improperly diminished, inquiry is whether, under all the facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

14. Habeas Corpus ¶447

Federal court's role in habeas attack on state court conviction is only to review for errors of constitutional magnitude.

15. Habeas Corpus ¶447, 508

There is no fundamental unfairness inherent in refusing to yield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final.

16. Habeas Corpus ¶462

Neither finality nor federalism will condone constitutional acquiescence in the

conviction of persons factually innocent of the crime charged.

17. Habeas Corpus ¶794

When a new rule is dictated by precedent, state can reasonably be asked to anticipate its articulation, and enforcing the rule in a subsequent habeas corpus proceeding involving a person convicted prior to the announcement of the rule does not intrude upon the state's legitimate interest in the finality of convictions, but new rule's application must otherwise be barred.

18. Habeas Corpus ¶794

Supreme Court *Caldwell* decision dealing with prosecutor's argument which diminishes jury's sense of responsibility for imposition of the death penalty was a new rule for purposes of determining whether it could be applied in habeas corpus proceeding to person whose state conviction occurred prior to its announcement, even if state law had provided a similar rule, as the Supreme Court's decision was new in its conclusion that the arguments violated the Eighth Amendment and went beyond prior decisions dealing with fundamental fairness of such jury arguments. U.S.C.A. Const. Amend. 8.

19. Habeas Corpus ¶794

Habeas petitioner may not escape limitation of use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence.

1. When this case was orally argued before and considered by the court, Judge Rubin was in regular active service. He participated in both the oral argument and the en banc conference, and with Judge King in the preparation of her dissenting opinion. He took senior status, however, on July 1, 1989. Based on his understanding of the Supreme

20. Criminal Law ¶723(1), 1208.1(4)

Prosecutor's closing argument indicating that jury's decision to impose the death penalty would be reviewed did not render death sentence fundamentally unfair.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.¹

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Robert Sawyer was sentenced to death by a Louisiana jury on September 19, 1980 for the brutal slaying of Frances Arwood. Today we decide his appeal from the denial by a United States District Court of his petition for writ of habeas corpus. We have elsewhere recorded the long history of Sawyer's efforts to overturn his conviction.² Sawyer's attack has now boiled down to three arguments. First, he argues that his court-appointed trial counsel was ineffective in certain respects. Second, and closely related to the first, he argues that his conviction should be set aside because his appointed counsel had not been licensed for five years as required by La.Code Crim.P. art. 512. Finally, he argues that the prosecutor in closing argument misled

Court decision in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), he considers himself ineligible to participate in the decision of this case, but he adheres to the views in Judge King's dissent.

2. *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).

the jury about its role in capital sentencing as condemned by *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

A panel of this court rejected Sawyer's contentions, dividing over the *Caldwell* issue, and we took the case *en banc*. We reject Sawyer's first two contentions for the reasons stated by the panel, affirm the district court's denial of Sawyer's petition for relief from his conviction, and turn to the difficult question of whether Sawyer is entitled to a new sentencing hearing because the state misled the jury about the jury's responsibility in deciding whether Sawyer should be executed.

Part I summarizes the facts. In Part II we sketch the constitutional principles that frame our inquiry. We next in Part III address the statutory overlay to the constitutional issues, as presented by the Supreme Court's recent decision in *Teague v. Lane*, — U.S. —, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Because we conclude that we cannot apply *Teague* without first defining the scope of *Caldwell*, we turn back in Part IV to the substantive constitutional questions. We endorse a version of Sawyer's construction of *Caldwell*. We find in Part V, however, that *Caldwell* so defined is a new rule within the meaning of *Teague*, and that *Caldwell* does not fit within either of *Teague*'s two exceptions. Sawyer's *Caldwell* argument is therefore *Teague*-barred. The prosecutorial argument complained of will thus vitiate Sawyer's death sentence only if Sawyer can prevail under the earlier rule of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In Part VI we conclude that Sawyer has no *Donnelly* claim. We therefore affirm denial of Sawyer's petition to vacate his sentence.

I

Caldwell addressed constitutional issues that arise when a prosecutor misleads a capital jury about its responsibility for the sentencing decision. The prosecutor's argument creates a possibility that the jury will decide between life and death without an appropriate sense of grave responsibility. Sawyer contends that *Caldwell* mandates a new sentencing trial any time a prosecutor taints the proceeding with a *Caldwell*-type argument, unless the argument had "no effect" upon the jury. Louisiana, however, says that a *Caldwell*-type prosecutorial argument will not generate constitutional grounds for reversal unless the argument rendered the sentencing phase "fundamentally unfair" to the defendant. Louisiana would have us focus upon effective prejudice to the defendant, rather than effective dilution of the jury's sense of responsibility. The case turns upon this disagreement.

Sawyer's *Caldwell* claim arises out of remarks which the prosecutor made in his closing argument during the trial's sentencing phase. The details of the prosecutorial remarks are important to Sawyer's argument. We therefore repeat those remarks here. The prosecutor told the jury,

The law provides that if you find one of these circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating

circumstances as defined by the statute, by the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision [emphasis supplied].

The prosecutor drew the jury's attention to the brutal nature of the crime for which Sawyer stood convicted. The prosecutor then returned to the theme of the jury's responsibility, saying

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less [emphasis supplied].

3. This word was likely recorded inaccurately by the stenographer. From context, it is clear that the prosecutor said, "It's all you're

After arguing that a death penalty was justified in Sawyer's case, the prosecutor struck the theme of jury responsibility again, telling the jury that their mistakes could be corrected by later decision-makers:

It's all your³ doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions [emphasis supplied].

II

The problem of *Caldwell* error touches upon three of the Constitution's grandest themes. Two of these are obvious. The problem implicates federalism, because the state asserts a power to decide for itself questions of criminal procedure. *Caldwell* analysis also concerns individual rights, since the defendant contends that diminishing a capital jury's sense of responsibility subjects him to cruel and unusual punishment. The third theme is perhaps less obvious, but no less important to understanding the issues raised by a *Caldwell* claim. *Caldwell* touches the principle of popular self-government, because the direct expression of popular sentiment through juries remains an important aspect of the people's participation in the government, and a crucial check upon the state's

doing." The two phrases sound identical, but their meanings are nearly opposite.

authority to define the limits of crime and punishment.

The jury seems always to be at the center of the judicial struggle with the death penalty. This should not be surprising. Differences over the role of the jury reflect differences over the wisdom of the penalty itself. The legislative judgment specifying execution as the punishment appropriate to certain crimes embodies a confidence both about the moral principles of the community and about the capacity of the criminal justice system to resolve factual disputes. Coupled to that confidence must be an equal certitude that the jury will be able to bring the community's principles to bear, and so judge blame and guilt accurately in the individual case.

In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), Justice Harlan summarized how history had given expression to this deep link between the death penalty and the jury. Justice Harlan explained that legislatures "to meet the problem of jury nullification ... did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Id.* at 199, 91 S.Ct. at 1463. Justice Harlan observed that the Court had earlier concluded that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary and community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." *Id.* at 202, 91 S.Ct. at 1464, quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 n. 15, 20 L.Ed.2d 776 (1968).

We have long recognized that decisions that depend essentially upon inarticulable judgment and common sense intuition are prime candidates for jury decision. Indeed, we refer to these judgments as "blackbox decisions." The sentencing decision in capital cases is born out of an inherent and unique mixture of anger, judgment and retribution, and requires a determination whether certain acts are so beyond the pale of community standards as to warrant the execution of their author. This decision to punish by death is a paradigmatic "black-box" call. To say that the decision can at best only be guided, not determined, by a judicial instruction or lawyers' argument underscores the decision's irreducible discretionary core.

A commitment to jury resolution of these blackbox decisions reflects a commitment to submit these issues to an active exercise of practical judgment, rather than to the reified precision of legal analysis. But the jury, of course, checks not only legalism but the government more generally. It protects from punishment those defendants who are innocent in the judgment of their peers. For both these reasons, the right to trial by jury has long been cherished within our legal tradition. Blackstone commended juries as an "admirable criterion of truth, and most important guardian both of public and private liberty." W. Blackstone, 4 *Commentaries* 407. The Constitution expressly secures the right to jury trial. It is, then, neither coincidental nor surprising that the jury's integrity should be so aggressively protected in capital cases, when the stakes are so high.

Of course, the Court has since rejected *McGautha's* teaching that "[t]o identify before the fact those characteristics ... in language which can be fairly understood

and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204, 91 S.Ct. at 1466. The Court has demanded that states guide the jury's discretion. The Court has also permitted states to take some power away from the jury. But the jury's sense of gravity, and the responsible discretion it fosters, remain crucial to post-*McGautha* sentencing schemes. *Caldwell* articulates a constitutional protection against state conduct that diminishes the jury's perception of its awesome responsibility.

In this sense, *Caldwell* itself is but the trace of a more comprehensive rule, one that might have trusted jury discretion to protect individual rights and express the scope of state power. The Court's post-*McGautha* jurisprudence has instead sought to secure individual rights by limiting jury discretion, and has deferred to the states' own restrictions upon jury power. The Constitution, after all, permits the people to speak through state law as well as through juries. Federalism, no less than jury participation, ties local penalties to local sentiment and local judgment.

Nonetheless, it is necessary to perceive the larger theme in order to understand its trace within the composition that remains. *Caldwell* stands in part for the continuing vigor of the ideals articulated by Justice Harlan in *McGautha*. *Caldwell* treats jury discretion within a framework that recognizes both federal and state limits upon the jury's power. But it is the larger whole behind the trace which accounts for *Caldwell's* peculiar nexus to the constitutional mix of individual autonomy, federalism, and populism.

Indeed, this reflection of *McGautha's* ideals in *Caldwell* forms the lynchpin of

Sawyer's argument here, and was the fulcrum for the argument that divided our panel. Only if *Caldwell* harkens back to the high esteem which *McGautha* accorded jury discretion can *Caldwell* impose, as Sawyer would have it, considerably more stringent restrictions than its Due Process Clause precursor, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). *Donnelly* subjected prosecutorial argument to a generalized "fundamental fairness" standard, which would benefit Sawyer only were he able to show actual prejudice from the argument complained of. Sawyer's principal argument presupposes that the Eighth Amendment, as interpreted by *Caldwell*, puts a particular premium upon responsible jury discretion in a proceeding that fixes punishment at life or death. It is that premium which would, on Sawyer's argument, distinguish *Caldwell* from *Donnelly*. The existence of that premium in turn assumes that a jury's deliberation may be even more crucial at the punishment phase than it is in choosing between guilt and innocence. That assumption makes sense only if, as Justice Harlan argued in *McGautha*, the jury's capacity to express moral sentiment directly is peculiarly essential to questions of capital blameworthiness.

[1] Because Sawyer's claim comes before us by way of a habeas petition, not by direct appeal, we view the delicate constitutional mix through a similarly complex statutory overlay. The law of the habeas writ balances the vindication of constitutional rights against the state's constitutionally legitimate interest in maintaining a criminal justice system capable of producing final convictions. The Supreme Court refined anew this balance in *Teague v. Lane*, — U.S. —, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Teague's* rule precludes habe-

as petitioners from seeking to overturn their convictions on the basis of rules new by comparison with the date their convictions became final. This statutory balance provides, however, exceptions for constitutional claims of a certain character. It may therefore wrap back around the constitutional issues, and so, in Sawyer's case, back around the questions about jury responsibility in capital cases. Yet a plurality, at least, of the *Teague* Court regarded the *Teague* retroactivity inquiry as a preemptive threshold to constitutional analysis. 109 S.Ct. at 1069. *Accord, Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 2944, — L.Ed.2d — (1989) (applying *Teague* as threshold barrier to constitutional analysis). Because *Teague* may present a threshold barrier to fuller consideration of Sawyer's constitutional claims, we begin our analysis with that case.

III

The Supreme Court did not decide *Teague* until after the *en banc* court heard oral argument in this case. At our request the parties have filed briefs regarding *Teague*'s applicability to Sawyer's petition.

[2] *Teague* adopts much of what Justice Harlan long advocated as the correct view of federal habeas. Under *Teague* a federal habeas petitioner attacking a final state conviction may rely only upon the law in effect when his conviction became final. There are two exceptions. First, the petitioner may rely upon a new rule if it would place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.*, 109 S.Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and

dissenting in part)). The Court has since declared that this first exception also applies to rules which exempt certain persons entirely from capital punishment. *Penry*, 109 S.Ct. at 2955. Second, the petitioner may rely on a new rule requiring the observance of "those procedures that ... are 'implicit in the concept of ordered liberty'" *Teague*, 109 S.Ct. at 1073, quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (opinion of Harlan, J.) (inside quote from *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.)).

A majority of the *Teague* court fully subscribed to this restriction on the use of federal habeas to attack final state court convictions. *Teague* left much of the restriction's content in doubt, although some of that ambiguity was removed by the Court's later decision in *Penry v. Lynaugh*, 109 S.Ct. 2934, 2944 (opinion of O'Connor, J., for the Court). In *Teague* itself, four justices concluded, in an opinion by Justice O'Connor, that the second proviso, drawn from Cardozo's incorporation formulation, should be modified to limit its scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S.Ct. at 1076-77. The remaining justices filed four separate opinions: Justice White concurred separately, as did Justice Stevens; Justice Blackmun joined part of Justice Stevens's opinion, and added a brief writing of his own; and Justices Brennan and Marshall dissented.

Teague was not a capital case, and the plurality disclaimed any decision regarding its application to an effort by a state prisoner to overturn his death sentence. Justice Stevens joined Justice O'Connor's opinion insofar as it adopted Justice Harlan's restrictions on federal habeas. He dissent-

ed, however, from the plurality's insistence that "the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt'..." *Id.* at 1081. He suggested that "a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings." *Id.* Justice Stevens noted that Justice Harlan's interest in making convictions final was "an interest that is wholly inapplicable to the capital sentencing context." *Id.* at 1081 n. 3. Justice O'Connor's plurality opinion replied that because *Teague* was not himself under a death sentence, the Court need not express any opinion "as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context. We do, however, disagree with Justice Stevens's suggestion.... As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 1077 n. 3.⁴

Note three did not gain majority support, since Justice White neither joined it nor otherwise mentioned *Teague*'s application to death cases. Justice Brennan's dissenting opinion, joined by Justice Marshall, assumes that the plurality would apply the new limits to death cases, and observes that "the plurality's new rule apparently would not prevent capital defendants ... from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus." *Id.* at 1089 n. 5.

The *Penry* decision settled *Teague*'s application to death cases. In Part II-A of her opinion for a fractured Court, Justice

O'Connor, joined by the Chief Justice and Justices White, Scalia, and Kennedy, held that *Teague* did apply to capital cases. The plurality simply observed that the finality concerns underlying the *Teague* doctrine hold equally well in capital cases, and offered no further analysis. The four remaining Justices dissented from the relevant portion of Justice O'Connor's opinion.

It remains unclear, however, whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits. 109 S.Ct. at 1069-70, 1077. However, Justices Stevens and Blackmun, who joined the plurality to constitute a majority in favor of Justice Harlan's approach to retroactivity, expressly rejected the plurality's position on this matter. Justice Stevens, joined by Justice Blackmun, contended that the Court should proceed by "first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief." Justice Stevens went on to observe that, absent a precise formulation of the rule in question, it may be difficult to determine whether the rule is in fact "new" at all. *Id.* at 1079-80 & n. 2. Finally, Justice White once again declined to join the relevant portion of the plurality opinion, leaving unclear his own position on the relation between the constitutional and *Teague* issues.

On this point, *Penry* leaves the matter unclear. A majority did join a portion of Justice O'Connor's opinion which characterized *Teague* as a rule to be applied "as a

death cases.

4. Justice Blackmun joined Justice Stevens's reservations about *Teague*'s applicability to

threshold matter." 109 S.Ct. at 2944 (Part II-A). Indeed, in Part IV-A all nine Justices joined a portion of the opinion which included a reference to *Teague* as a threshold test. *Id.* at 2952. We must take care, however, not to overstate the significance of these votes. Thus, although Justice Stevens joined Part IV-A of Justice O'Connor's opinion, he reiterated in a separate concurrence his view that the constitutional rule should be articulated before *Teague* is applied. The threshold character of the *Teague* bar was not the primary topic of Part II-A or Part IV-A, and it would be unwise to assume that each Justice joining those parts intended that *Teague* function as a threshold barrier in every case where it applied.

More importantly, however, Justice O'Connor's own opinion mixed the *Teague* inquiry with the constitutional questions. In order to decide that Penry's requested rule was dictated by precedent, and so not new, she had to decide precisely the substantive question which divided the Justices five-to-four over Part III of her opinion: that is, the question of whether Penry's proposed rule was the best possible interpretation—let alone the interpretation "dictated by"—Supreme Court precedent. 109 S.Ct. at 2944-46 (Part II-B). Likewise, Justice Scalia, dissenting in part and joined by the Chief Justice, Justice White and Justice Kennedy, observed that "[t]he merits of the mitigation issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated." 109 S.Ct. at 2964.

The relationships that led to a mixing of the *Teague* issues and the constitutional issues in *Penry* become all the more powerful when a petitioner attempts not to establish a new rule, but to rely, as Sawyer

would like to, upon a rule that is new by comparison to his own conviction yet is well established by the time of his habeas petition. In such a case, a court may have to reach the constitutional questions even to define what the petitioner complains of—in Sawyer's case, for example, "*Caldwell* error." Moreover, the court does not risk the awkward outcome of establishing a new rule in a case where it has no application. See *Teague*, 109 S.Ct. at 1077-78. The rule relied upon—for example, the rule governing *Caldwell* error—exists by the time the *Teague* issues arise in connection with a particular prisoner's petition.

Indeed, Sawyer's argument illustrates the difficulties that may arise from an attempt to separate *Teague* analysis from the substance of the constitutional claims raised. Whether *Caldwell* is a new rule, and whether *Caldwell* is a rule "implicit in the concept of ordered liberty" that implicates factual innocence, both depend in part upon what *Caldwell* means, and, more specifically, upon the relation between *Caldwell* and *Donnelly*. This dependence is made unmistakably clear by Louisiana's briefing of the *Teague* issue, which suggests that *Teague* is no bar to Sawyer's *Caldwell* claim precisely because Sawyer is wrong about the relation between *Caldwell* and *Donnelly*. If the Supreme Court had made clear that *Teague* necessarily bars an inquiry into the merits of the petitioner's constitutional claims, we would perhaps have to resolve the *Teague* issues by a conditional discussion of *Teague*'s application to what Sawyer says *Caldwell* might mean. Such a conjectural analysis of possible rules would, however, entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy—which would be the ostensible goal of any version of *Teag-*

ue that preempted some constitutional inquiries.

[3] We thus choose to address the merits of Sawyer's interpretation of *Caldwell* before applying *Teague* to *Caldwell*. We do not mean, however, by adopting this strategy to suggest that *Teague* never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question. We leave that issue for a case in which it is properly presented, and turn to the merits of the constitutional arguments.

IV

[4] At a general level, *Caldwell*'s import is clear. Regardless of whether the Court moves toward or away from the *McGautha* acceptance of juror discretion, the sentencing jury must continue to feel the weight of responsibility so long as it has responsibility. Lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role. For the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function. It is not surprising then that jury arguments calculated to have that effect have long been condemned by numerous jurisdictions. See *Caldwell*, 105 S.Ct. at 2642 nn. 4 & 5. See also Mello, *Taking Caldwell v. Mississippi Seriously*, 30 B.C.L.Rev. 283, 305-308 & nn. 100-114 (1989). The decision of the Court in *Caldwell* reflects this reality, insight born more

of experience than of empirical study or abstract exposition.

[5] In no way is the importance of *Caldwell* error diminished by the possibility that a state may dispense with the jury's sentencing power in capital cases. See *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The evil of *Caldwell*-type prosecutorial arguments is not that they divest juries of their responsibility, but rather that they distort the jury's understanding of a power which it in fact retains. The decision-maker empowered to choose between life and death must not be relieved of the gravity attending that choice. Whether a judge or jury decides the sentence, the responsibility to decide must remain adjoined to the power to decide. It would, of course, be less likely that a prosecutor could mislead a judge, whose own knowledge of the law should overcome any misleading argument. But a judge who misunderstands the sentencing decision in a capital case creates a Constitutional defect no less significant than a jury which misunderstands its decision. Cf. *Hickerson v. Maggio*, 691 F.2d 792, 794-95 (5th Cir.1982).

The argument between Sawyer and Louisiana does not draw into question these general observations. Sawyer contends that *Caldwell*, recognizing the unique role of the jury in capital sentencing, imposes an especially stringent procedural safeguard by requiring that the defendant receive a new sentencing hearing if the prosecutor's argument had any effect on the jury's perception of its own responsibility. Louisiana concedes the impropriety of prosecutorial argument that misleads the jury as to its role, but contends that the sentencing phase is marred by a constitutional defect only if the prosecutorial argument

rendered it "fundamentally unfair." According to Louisiana, *Caldwell* did not establish a "no effect" test for constitutional error, but simply applied *Donnelly*'s "fundamental fairness" test to the facts of a sentencing hearing. On this argument, *Caldwell* extends *Donnelly* to punishment proceedings without altering *Donnelly*'s rule by any reaffirmation of *McGautha*'s reflections upon jury responsibility.

It is this argument which brought the case before the *en banc* court. To resolve it, we must consider *Caldwell* in some detail. We begin with the facts.

Caldwell killed the owner of a grocery store in the course of a robbery. His lawyers' plea for mercy at the sentencing phase of his capital murder trial rested on his poverty, troubled youth, and character evidence. His lawyers argued

[E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death—the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 105 S.Ct. at 2637. The argument triggered the following exchanges:

"ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

"COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

"THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

"ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I

think it's unfair and I don't mind telling them so."

Id. at 2637–38. A divided Mississippi Supreme Court affirmed and the Supreme Court granted certiorari. Speaking for the Court, Justice Marshall concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 105 S.Ct. at 2639. He explained that the court's post-*Furman* review of state procedures "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Id.* at 2640. He then found "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.*

The State proposed three reasons why the prosecutor's argument should not upset the death sentence. The State argued that under *California v. Ramos*, 463 U.S. 992, 1001–06, 103 S.Ct. 3446, 3453–56, 77 L.Ed.2d 1171 (1983), it was free to instruct juries in capital cases about appellate processes. In part IV(a) of the *Caldwell* opinion, joined only by Justice Brennan, Justice Blackmun and Justice Stevens, Justice Marshall rejected this argument. He concluded that, unlike in *Ramos*, the argument in *Caldwell* was not relevant to a valid state penological interest and was misleading. In the *Caldwell* plurality's view, appellate review was simply not relevant to the juror's task of determining an appropriate sentence. For that reason, the prosecutor's argument that the jurors should view themselves as only taking a preliminary

step in the sentencing determination served no valid state interest. Justice O'Connor's concurring opinion agreed, but refused to read *Ramos* "to imply that the giving of nonmisleading and accurate information regarding the jury's role . . . is irrelevant to the sentencing decision." *Id.*, 105 S.Ct. at 2646 (O'Connor, J., concurring; emphasis in original). In her view the prosecutor's argument was impermissible because it misled "in a manner that diminished the jury's sense of responsibility." *Id.*

The Court next rejected the state's contention that the prosecutor's argument was a reasonable response to defense counsel's argument. The Court observed that the prosecutor's reference to appellate review did not respond to defense counsel's suggestion that a sentence of life would be without parole, nor to the defense's religious theme and plea for mercy.

Finally, and most importantly for our purposes, the Court rejected the State's contention that in any event the effect of the prosecutor's argument should be measured by the standard of *Donnelly v. DeChristoforo*, which would judge improper prosecutorial arguments to vitiate a sentencing proceeding only if they rendered the proceedings fundamentally unfair. The Court distinguished *Donnelly* on two grounds. First, the Court pointed out that in *Donnelly* the trial court gave a strong curative instruction to the jury, while in *Caldwell* the judge not only gave no correcting instruction but "stated to the jury that the remarks were proper." *Id.*, 105 S.Ct. at 2645. Second, in *Donnelly* the remarks were ambiguous and not focused pointedly upon "the principal concern" of our jurisprudence concerning the death penalty, the "procedure by which the State imposes the death sentence." *Id.* (quoting

California v. Ramos, 463 U.S. at 999, 103 S.Ct. at 3452).

Justice Rehnquist, joined by Justice White, dissented, contending that when the argument was placed in its full trial setting it "fell far short of telling the jury that it would not be responsible for imposing the death penalty." 105 S.Ct. at 2649 (Rehnquist, J., dissenting). Rather, "the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence." *Id.* at 2650 (emphasis in original). He observed that under *Ramos* there was nothing wrong with telling a jury that its decision is subject to appellate review, and that the prosecutor did not mislead the jury by suggesting that its decision would be subject to de novo review.

The division between the *Caldwell* majority and the dissenting Justices, like the division between Sawyer's argument and Louisiana's argument, turns in significant part upon the fate of *Donnelly*'s "fundamental fairness" formula in capital sentencing proceedings. As we shall see, the effect upon a death sentence of *Caldwell* error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of *Caldwell* error. Much of the argument here is over the ingredients of the prohibition.

Sawyer, as we have said, argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*. Sawyer argues that the prosecutor's argument at the sentencing phase of his trial

misled the jury regarding its role. In particular, he contends that the argument unambiguously told the jury that its role was only to recommend punishment and that others would check their decision, an argument even more pointed than in *Caldwell*. Sawyer maintains that such an argument effectively renders a proceeding fundamentally unfair by definition, and that the standard of *Donnelly* is therefore inapplicable because superfluous. It follows, he argues, that he is entitled to a new sentencing hearing before a jury properly aware of its responsibility. According to Sawyer, neither a contemporaneous objection nor participation by the trial judge are prerequisites to a *Caldwell* claim. *Caldwell* mandates a new sentencing hearing so long as the court reviewing *Caldwell* error "cannot say that [the prosecutor's statements] had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 328-329, 105 S.Ct. 2639-2640. Sawyer says that in *Kirkpatrick v. Blackburn*, 777 F.2d 272, 289-90 (5th Cir.1985), this court declared that "the no effect test applies to the state's effort to minimize the jury's sense of responsibility, not to every other improper argument." He maintains that the Supreme Court in *Darden v. Wainwright* adopted this court's position holding *Caldwell* applicable in any case where the prosecutor "mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144 (1986).

As already mentioned, Louisiana contends, in essence, that *Caldwell* merely applies *Donnelly* to a case where the combination of prosecutorial and judicial action at a sensitive moment rendered the proceedings especially unfair to the defendant.

Louisiana argues that no new sentencing hearing should be ordered unless we find both that there was *Caldwell* error and that it rendered the trial fundamentally unfair. Pointing to *Darden v. Wainwright*, the State argues that Sawyer must show prosecutorial misconduct that "so infected the trial as to deny due process." See *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly v. DeChristoforo*). Louisiana argues that the due process standard is applicable because the prosecutor's argument, when stripped of non-misleading statements, was not as clear and focused as in *Caldwell*. Louisiana stresses the absence both of any objection by defense counsel and of any signal from the trial judge that might have endorsed the prosecutorial misstatement.

[6] We agree with Sawyer that *Caldwell* must be read in light of *McGautha*. The state cannot resist a conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. See, e.g., *Coleman v. Brown*, 802 F.2d 1227, 1238-41 (10th Cir.1986), *cert. denied*, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987); see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1460-61 (9th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir.1987) (en banc), *cert. denied*, — U.S. —, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987); *Mann v. Dugger*, 844 F.2d 1446, 1457-58 (11th Cir.1988) (en banc). Cf. *Hopkinson v. Shillinger*, 866 F.2d 1185, 1226-33 (10th Cir.1989); *id.* at 1233-38 (Logan, J., dissenting). Once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the

Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case"—and the Supreme Court has told us precisely that, see *Darden*, 106 S.Ct. at 2473 n. 15,—it is apparent that, as Sawyer contends, the *Donnelly* issue of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error.

[7] If the state has misled the jury in the manner condemned by *Caldwell*, it can be no answer that the culprit was the prosecutor and not the judge. With either source, the error is the same. Although in *Caldwell* there was an objection and a potent affirmation of the misleading argument by the trial judge, the relevance of these events was to the question of whether the jury was actually misled. In other words, the absence of objection and trial judge participation are highly relevant to the question of whether a jury was misled, but their absence is not determinative as a matter of law of the question of whether the state misled the jury. We do not read the Court's opinion in *Darden* to the contrary.

[8] "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, — U.S. —, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). In short, a prosecutor's statements to the jury accurately describing its role will not support a *Caldwell* claim. At the same time, a statement can be literally true but quite misleading by failing, for example, to disclose information essential to make what was said not misleading. Indeed much of our law of fraud under the Securities Act

rests on just such a reality. See 17 C.F.R. 240.10b-5(b).

[9, 10] It is suggested that, in spite of these considerations, a willingness to find *Caldwell* error from unobjected to argument by a prosecutor unwise creates an incentive for defense counsel to not object. After all, an objection may lead to a curative instruction and any appellate point is not lost by remaining silent. The questionable validity of the assumed incentives aside, these concerns as well as the other values that lie behind our usual insistence that error be preserved are not unique to *Caldwell* error. The essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection. More to the point, the decision to entertain claimed constitutional error without a contemporaneous objection belongs in the first instance to the state, when as here, we review a state court conviction. A state may insist upon a contemporaneous objection. And, ordinarily, a federal habeas court is bound by that decision and cannot reach claims of error found by the state to have been waived. *Dugger v. Adams*, 109 S.Ct. at 1215. In short, whether to insist upon a contemporaneous objection as a matter of orderliness, as distinguished from the question of whether an objection is an element of the constitutional claim itself, is a matter for the state court.

[11] It is suggested that even if the *Caldwell* issue must be addressed because the state reached its merits, a contemporaneous objection is an element of a *Caldwell* claim. We have concluded that a timely objection is an essential element of a claim of racial discrimination in the exercise of preemptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90

L.Ed.2d 69 (1986). *Jones v. Butler*, 864 F.2d 348, 369 (5th Cir.1988) (on petition for rehearing). But the constitutional rule in *Batson* rests on a change in the requirement of proof from that of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (insisting upon proof of a pattern of discrimination by prosecutors in cases) to the case specific procedures of *Batson*. *Teague*, 109 S.Ct. at 1066. *Batson* assures an objecting defendant that a prosecutor striking black veniremen will articulate non-racial reasons for its decisions. An objection is plainly central to a *Batson* claim. *Caldwell*, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* In *Caldwell*, unlike in *Batson*, the constitutional defect—if it exists—is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

In sum, we reject Louisiana's proffered definition of *Caldwell*. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation.

[12, 13] Continuing our definition of *Caldwell* error, we turn to the question of what an appellate court looks to in gauging the state's conduct, and quickly find that the nature of the prohibition takes us a long way toward the answer. What has been communicated to the jury by the state cannot be disentangled from the total trial scene, and thus that is our terrain. While the prosecutor's argument will often be the natural point of departure, we must turn to the opposing argument and then to instructions of the court, both in its formal charge and in any rulings on objections. The initial focus will be upon the close of the sentencing hearing, yet inquiry may proceed not only to the guilt phase but to jury selection as well. In short, a trial cannot be cabined into distinct segments. As the Supreme Court phrased it: "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp v. Naughton*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

While this is inevitably a case-by-case inquiry with a broad terrain to be surveyed, there are a number of events that obviously may loom large and quickly focus the inquiry. First, the trial judge is an extraordinarily puissant figure. A direct and uncorrected misstatement to the jury that misleads the jury regarding its role will be difficult to salvage. For example, *Caldwell* error was found by the Eleventh

Circuit when a trial judge told the jury that he was the ultimate determinant of whether the defendant was sentenced to death. The Circuit reached this conclusion even though the jury's role under Florida law is advisory. *Adams v. Wainwright*, 804 F.2d 1526, 1532-33 (1986), modified on denial of rehearing, 816 F.2d 1493 (1987), rev'd on other grounds, *Dugger v. Adams*, — U.S. —, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Second, the absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript. Third, the argument may take on a different hue when read as a reply to opposing counsel. Fourth, the court may have mitigated the effect of counsel's argument by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence. Fifth, veniremen often receive extensive instruction during voir dire. These instructions, as well as the questions and advices of counsel, are also relevant. Finally, through the course of trial the judge may give detailed instructions to the jury about its role. Such familiar instructions are part of the message to the jury and all must be considered. We list these lines of inquiry to explain the scope of inquiry that may be required in review of asserted *Caldwell* error, without suggesting that the list is exhaustive. By definition, it is not and cannot be. Indeed, in some cases the presence or absence of error will be readily determinable solely on the basis of the prosecutor's argument and the trial judge's treatment of it.

V

A

Sawyer's conviction was final at least by 1984 when the Supreme Court denied his

petition for certiorari. See *Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Because Sawyer wishes to rely on the Court's later decision in *Caldwell*, he must grapple with the limitation of *Teague*. Sawyer first argues that *Teague* does not bar his argument because *Caldwell* did not announce a new rule, so that the prosecutor's argument was constitutionally infirm measured by the law in place in 1984 when his conviction became final.

The Supreme Court's decision in *Penry* left the definition of a "new rule" in some doubt. Justice O'Connor reiterated her statement, first presented in *Teague*, that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government, [or] to put it differently . . . if the result was not dictated by precedent." *Penry*, 109 S.Ct. at 2944 (quoting *Teague*, 109 S.Ct. at 1070 (plurality opinion)). Yet Justice O'Connor's application of this standard led Justice Scalia, joined by three colleagues, to contend that the Court had only given "lip-service" to the *Teague* standard. *Penry*, 109 S.Ct. at 2964 (opinion of Scalia, J., dissenting; Part II). Justice Scalia said that "it challenges the imagination to think that today's result is 'dictated' by our prior cases." *Id.* at 2965. He went on to say that "[i]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling," and went so far as to remark that "[i]t is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term." *Id.* at 2965.

Justice Scalia's comments are especially significant because he speaks on behalf of all three Justices who joined Justice O'Connor's plurality opinion in *Teague*, and on

behalf of Justice White as well. Yet, Justice Brennan, in his separate *Penry* opinion, apparently does not agree with Justice Scalia that *Teague* has been gutted. Justice Brennan reiterates his contention, first made in his dissent from *Teague* itself, that the *Teague* rule is an "unprecedented curtailment of the reach of the Great Writ," and accuses the majority of compounding its errors by extending *Teague* to death cases.

Indeed, Justice O'Connor's application in *Penry* of *Teague*'s "new rule" formula may well have turned upon facts which she thought unique to *Penry*'s claims. In Justice O'Connor's view, *Penry* sought only to compel Texas "to fulfill the assurance upon which [*Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at 2945. *Penry*'s claim rested on the clearly established and specific Constitutional rule that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the offense that mitigates against imposing the death penalty." Justice O'Connor concluded that the path from *Jurek* to *Penry* involved the consistent application of an established constitutional rule to, in essence, changes in the facts.

Because of these disagreements about the meaning of the *Teague* test, the Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a "new rule." We must interpret what Justice O'Connor has said by reference to

the purposes served by the *Teague* rule. To undertake that inquiry, we first turn to the complex of concerns now accommodated within federal habeas jurisprudence.

[14] A federal court's role in a habeas attack on a state court conviction is only to review for errors of constitutional magnitude. The Constitution commands us to defer to federalism, and so recognizes that the solemn judgment of a state's highest court enjoys a presumption of validity, which may be overcome only for failure to abide the Constitution itself. The role that remains for federal courts is by no means modest. To the contrary, viewed over the full span of history, it is rather an extraordinary reach for superintending power. Indeed, the first legislation empowering federal courts to issue a writ for state custody did not come until the Habeas Act of 1867. Until the Court's decision in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original proceeding. . . ." Seen in this light, casting our role as that of a constitutional backstop is hardly a retrenchment, and *Teague*'s reach for finality is modest indeed.

[15] *Teague*, whether applied to a capital sentence or to a more ordinary case, is by no means a return to the law that preceded *Brown v. Allen*, if indeed it is a turn in that direction at all. *Teague* rather reflects a distinct and basic judgment that, putting aside the cases falling within its two provisos, there is no fundamental un-

fairness inherent in refusing to wield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final. Due regard for the constitutional structure of federalism, and the protection it accords to state government, counsels the opposite—that only preservation of constitutional principles justifies the intrusion.

[16] The *Teague* judgment about the federal role acknowledges that neither finality nor federalism will condone constitutional acquiescence in the conviction of persons factually innocent of the crime charged. Our efforts to reduce the risk of convicting an innocent person are evidenced by myriad procedural safeguards and by high requirements of proof. These restrictions reflect a commitment to accurate outcomes so firm that we consciously increase the chance of acquitting guilty persons to reduce the chance of convicting the innocent. It is not surprising, then, that the Supreme Court is fairly unanimous in its view that a state court prisoner can rely upon a fundamental constitutional rule implicating factual innocence even though that rule was not announced until after his conviction became final.

It might nonetheless be contended that the Court's "factual innocence" proviso is not enough to vindicate the rights of prisoners, and that capital cases show particularly well various considerations that compel a narrow formulation of *Teague*'s "new rule" element. One reasoning along these lines might point to the inherent finality of the death penalty, and contend that the benefit of every announced consti-

5. See *Mackey v. United States*, 401 U.S. 667, 684, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404

(1971) (Harlan, J., concurring).

tutional rule should be given to a prisoner facing this extreme penalty. One might likewise argue that in habeas petitions challenging a death sentence but not the underlying conviction, the state need not fear that it will have to relitigate issues of innocence and guilt on the basis of state evidence, and so run the risk of freeing a criminal who would have been convicted by a fair and timely trial. Finally, continuing to reason against finality interests on the basis of concerns unique to death cases, one might argue that in such cases there is no danger that the state's efforts at rehabilitation will lose their focus because of the habeas process; that habeas petitioners succeed more frequently in capital cases than in other cases; and that other factors, external to the habeas system, are responsible for delays in the execution of state prisoners.

Yet unless we suppose a perfectly stable constitutional jurisprudence, it is unclear how finality could ever be achieved if these arguments are accepted at full reach. As the Court made clear in *Penry*, the order of magnitude of punishment is not relevant to *Teague*'s support of finality so long as we except rules implicating factual innocence. The "death is different" argument in this context is little more than an argument against the validity of the punishment itself. As an argument directed to the purposes of *Teague*—the matter now before us—it fails.

Of course, the penalty is different from all others in many respects. We recognize that it is the extreme of punishments when we reserve the punishment for the most extreme of crimes, as we do under our present law. Death sentences, which by their nature aim at retribution or deterrence and not at rehabilitation, obviously do implicate different state purposes than

do terms of incarceration. But that the interests are different does not imply that they are less deserving of federal deference, or that comity concerns are any less important. A state policy predicated upon the certainty of exact retribution, no less than a state policy predicated upon incarceration in a facility designed in part to rehabilitate, suffers when the prospect of punishment is confused by a series of collateral federal attacks.

Indeed, much that is unique about the law controlling death cases is in fact a powerful testament to the need for the finality-serving rules of *Teague*. The constitutionally secured rules announced for death cases by the Supreme Court since *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), have come in such number and with such rapidity that the entire jurisprudence is fairly described as being in a state of flux. During the ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can, with little dissent, be described as presenting issues of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases. In the 1986 term alone, the Supreme Court acted on eighty requests for stay of execution. This undermines the argument that *Teague* has no application to death cases.

Nor is there anything inhumane in an insistence that a death-sentenced state prisoner confine his attack upon that sentence to the rules in effect when his conviction became final. So long as nothing new implicates the petitioner's factual innocence, we, confronted with the need for sureness

of punishment as contrasted with the never ending uncertainty and serendipitous state of a nigh open set of rules, see little to persuade us that respect for human dignity counsels against application of finality rules.

[17] In light of the powerful reasons that justify the *Teague* doctrine, we see no cause to limit its application to the rare or extraordinary case. When a rule is indeed dictated by precedent—a word Justice O'Connor took care to emphasize in *Penry* as she did in *Teague*—then a state can reasonably be asked to anticipate its articulation, and enforcing the rule in a habeas proceeding will not intrude upon the state's legitimate interest in the finality of convictions. Otherwise, however, *Teague* must bar the rule's application. We do not, despite Justice Scalia's strong words in dissent, read *Penry* to the contrary. Instead, we believe that Justice O'Connor regarded *Penry* as a special case, one simply reapplying the rule of *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to a unique development in state law. See *Penry*, 109 S.Ct. at 2945 (Opinion of O'Connor, J., Part II-B, discussing *Jurek*). Justice O'Connor honored the language of the *Teague* opinion, and we must assume she intended to honor its spirit as well.

B

Sawyer correctly observes that many state courts, including Louisiana, had before *Caldwell* developed common law rules forbidding misleading jury argument about the importance of the jury's decision. See, e.g., *Pait v. State*, 112 So.2d 380, 383-84 (Fla.1959); *Blackwell v. State*, 76 Fla. 124, 79 So. 731, 731, 735-736 (1918); *Wiley v. State*, 449 So.2d 756, 762 (Miss.1984); *State v. Jones*, 296 N.C. 495, 251 S.E.2d

425, 427-29 (1979); *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977); *People v. Morse*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 211-212, 388 P.2d 33, 43-44 (1964); *State v. Mount*, 30 N.J. 195, 152 A.2d 343, 351-52 (1959); *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465, 467 (1940). For example, the Louisiana Supreme Court ordered a new sentencing hearing in a 1982 capital case when, without objection, the prosecutor argued to the jury that the "buck" started with them and did not end there, and that "everything" will more than likely be reviewed by every appeals court in the United States. *State v. Willie*, 410 So.2d 1019, 1034-35 (La. 1982). But it does not necessarily follow from the circumstance that Louisiana law forbade the argument made by Sawyer's prosecutor when it was made, that the Supreme Court did not announce a "new" rule in *Caldwell*.

Sawyer's argument fails to deal with *Teague*'s explicit offer of *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), as an example of a decision that created a "new rule." *Ford* held that the Eighth Amendment prohibits states from inflicting the penalty of death on an insane prisoner. Execution of the insane was prohibited at common law. Indeed, the *Ford* Court observed that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . ." 477 U.S. at 406, 106 S.Ct. at 2600. Moreover, twenty-six states of the forty-one with a death penalty had "statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408, n. 2, 106 S.Ct. at 2601, n. 2. Sawyer's reliance upon *Caldwell*'s common law roots and its relationship to the rules

of several states, including Louisiana, cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*.

[18] There was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional footing. *Caldwell* was certainly new in its conclusion that such arguments violated the Eighth Amendment. See Mello, 30 B.C.L. Rev. at 305. Of course, when Sawyer's conviction became final, *Donnelly* would have authorized federal jurisdiction over a habeas petition attacking the sentence on due process grounds. Yet, as we have seen, Sawyer persuasively contends that *Caldwell* was more than a straightforward application of *Donnelly* to new facts. Our question is then whether these changes suffice to make *Caldwell* a new rule within the meaning of *Teague*.

The *Teague* court held that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 109 S.Ct. at 1070 (emphasis in original). Accord, *Penry*, 109 S.Ct. at 2944. We have little difficulty in concluding that so measured, *Caldwell*'s greatly heightened intolerance of misleading jury argument is a new rule within the meaning of *Teague*. Its direct impact upon the finality of state convictions is illustrated by this case.

Sawyer, however, nonetheless contends that this heightened standard for review of prosecutorial argument does not create a new rule. He has two arguments. First, Sawyer says that Louisiana not only condemned *Caldwell*-type prosecutorial argu-

ment, but did so under an Eighth Amendment standard identical to the *Caldwell* standard. For this proposition, Sawyer cites a string of Louisiana cases explaining that Louisiana's death penalty procedures were designed to comply with the Supreme Court's Eighth Amendment decisions, see, e.g., *State v. Payton*, 361 So.2d 866, 870-73 (La.1978), *State v. Scannier*, 379 So.2d 1336, 1370 (La.1980), and *State v. Willie*, 410 So.2d 1019, 1032-33 (La.1982), and another string of Louisiana cases condemning *Caldwell*-type prosecutorial arguments, see, e.g., *State v. Berry*, 391 So.2d 406, 418 (La.1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981); *Willie*, 410 So.2d at 1034-35, and *State v. Robinson*, 421 So.2d 229, 231-34 (La.1982).

Yet it is one thing to say that a state, inspired by earlier constitutional decisions, had anticipated *Caldwell* as a matter of state law, and a very different matter to say that the state had recognized a *Caldwell*-type rule as a constitutional restriction on its own power. In an effort to bring the Louisiana cases within the latter category, Sawyer relies heavily on the Louisiana Supreme Court's recent post-*Caldwell* decision in *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988). There, the Louisiana Court said it need not consider a *Caldwell* claim on collateral attack after rejecting a similar state law challenge on direct review, for *Caldwell* "did not change our previous case law." Again, however, this statement and the other remarks in *Busby* indicate only that the state law and *Caldwell* rules are coincident. The remarks do not show that Louisiana law condemned *Caldwell* argument because it regarded such argument as an Eighth Amendment violation. We therefore need not decide whether, if a rule is "new" as a matter of constitutional interpretation but not "new"

in state interpretations of the federal Constitution, it is nonetheless "new" for purposes of the *Teague* bar upon collateral federal challenges to state convictions.

Sawyer next contends that this Circuit in *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir.1985), cert. denied, — U.S. —, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986), has already decided that *Caldwell* is not a new rule. In *Moore*, we held that even if the *Caldwell* standard were separable from the Louisiana state standard for assessing prosecutorial argument, petitioner Moore should have anticipated in an earlier habeas petition the possibility of a distinct constitutional standard. We therefore held that Moore's *Caldwell* argument was not "new" for purposes of the writ abuse doctrine, and stated that the doctrine would bar the argument. Sawyer's attempt to rely on *Moore* must fail, for the meaning of "newness" differs in writ abuse cases from its meaning in *Teague* cases. In writ abuse cases, the key question is whether a particular argument is being made by attorneys: the argument is not "new" if it is being made, and so should be known to attorneys. The Supreme Court makes clear, however that a rule is new for purposes of *Teague* if it has not been accepted at the time the petitioner's conviction became final. *Teague*, 109 S.Ct. at 1070. *Moore* thus cannot bear the freight Sawyer would put on it.

C

The *Teague* test allows two exceptions. Sawyer, however, cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution. He contends only

that the state's sentencing procedure was unconstitutionally administered. *Teague*'s first exception, dealing with substantive limitations upon the criminal law-making authority, therefore does not apply.

We turn, then, to the plurality's insistence in *Teague* that a new rule may be relied upon by a habeas petitioner if it both "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" and "procedures without which the likelihood of an accurate conviction is seriously diminished." Sawyer contends that we should not in his case apply the "accurate conviction" qualification to Harlan's proviso. First, Sawyer argues that the qualification is only a plurality view. The *Penry* opinions did not discuss the "fundamental to ordered liberty" proviso, or the "actual innocence" qualification to it. However, Justice White's joinder in Justice Scalia's dissent, and in Part II-A of Justice O'Connor's opinion (which references the *Teague* plurality's formulation of the exceptions), strongly suggests that Justice White has adopted the position of the *Teague* plurality. In any event, our short answer is that pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can.

[19] Second, Sawyer argues that confining use of new rules to those implicating factual innocence has no relevance to a jury's decision to impose a death and not a life sentence. We are not persuaded. A habeas petitioner may not escape this limitation on use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence. Rather, such a petitioner must show that the new rule insists on procedures without which

the correctness of the jury's decision to punish by death rather than by life imprisonment is seriously diminished.

We thus accept the plurality's formulation of the proviso, and turn to its application. Our task is made difficult by the newness of the amalgam of the second proviso as well as its uncertain precedential footing. Justice O'Connor's opinion for the plurality insisted that it is "unlikely that many such components of basic due process have yet to emerge." 109 S.Ct. at 1077. Justice O'Connor went on to say that these components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods" (citations omitted). The new rule contended for in *Teague* was an extension to petit juries of the fair cross section requirement of a jury venire. The plurality opinion concluded that such a new rule "would not be a 'bedrock procedural element' that would be retroactively applied under the second exception...." *Id.* at 1077.

While the Court has made plain that it expects to encounter few new, discovered bedrock procedural rules, it is not clear how *Caldwell*, with its condemnation of a particular type of jury argument, fits into the *Teague* scheme. This difficulty stems in part from uncertainty about *Teague*'s standard for sorting the bedrock from the host of other rules calculated to enhance the efficiency and fairness of a trial. We can immediately put aside rules that only enhance as distinguished from rules essential to fundamental fairness. This first cut is informed by developed principles of incorporation doctrine that leave the states

free of all but the core assurances, variously expressed as rejecting "tail with the hide" and "jot-for-jot" incorporation. See e.g., *Duncan v. Louisiana*, 391 U.S. 145, 181, 88 S.Ct. 1444, 1465, 20 L.Ed.2d 491 (1968) (Harlan, J., dissenting). For example, the Fourteenth Amendment requires Louisiana to provide Sawyer a jury and a fundamentally fair trial. Louisiana has wide latitude in its choice of procedures for doing so and few procedures are so essential as to be required by the Fourteenth Amendment. This distinction is reflected in our willingness to find errors to be harmless and our refusal to grant relief absent a demonstration not only that the rule was violated but also that its violation rendered a trial fundamentally unfair.

Caldwell manifestly implicates two principles that would be fundamental in the sense required by *Teague*'s second proviso. The first is *Donnelly*'s restriction requiring that a proceeding not be "fundamentally unfair" to the defendant. The second is the more expansive regard for jury discretion suggested by *McGautha*, a regard trimmed back, as we have mentioned, by the Court's later interpretations of the Eighth Amendment. Were Sawyer seeking to rely on either of these principles as new rules, his argument would be compelling. Yet *Donnelly*'s principle is not new by comparison to Sawyer's conviction, and *McGautha*'s general themes do not constitute a rule at all. What Sawyer seeks to rely upon is *Caldwell*'s modification of *Donnelly* in light of the ideals discussed in *McGautha*. That modification is not itself so fundamental as to be "implicit in the concept of ordered liberty." After all, the only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as to

render their sentencing trial "fundamentally unfair."

A recent decision of the Supreme Court supplies additional guidance for our inquiry. In *Dugger v. Adams*, the Court decided whether Florida's procedural default rule barred Adams's *Caldwell* claim. To resolve that issue, the Court had to determine whether a "fundamental miscarriage of justice" would result if the procedural default rule were permitted to defeat Adams's *Caldwell* claim. The Court held that no such miscarriage of justice would arise.

In reaching its conclusion, the *Adams* Court wrote as follows:

The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." ... According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," ... the standard for showing a fundamental miscarriage of justice is necessarily satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," ... into an all too ordinary one.

109 S.Ct. at 1217-18 & n. 6.

Adams, of course, does not directly control *Teague*'s application to a *Caldwell*

claim. *Adams* applies a "fundamental miscarriage of justice" standard to determine whether a *Caldwell* claim might fit within an exception to the procedural default rule. *Teague* applies an "implicit in the concept of ordered liberty" and "implicating factual innocence" standard to determine whether a *Caldwell* claim might fit within an exception to the doctrine barring habeas petitioners from relying on new rules. The verbal formulae are different, and their application thus might differ, too. Moreover, the *Adams* miscarriage standard requires scrutiny of the facts of a particular case, while the *Teague* ordered liberty standard looks to the character of the general rule asserted.

Nonetheless, we must take care not to exaggerate the substantive import of these semantic differences. Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final. Indeed, in some respects *Teague* functions as a radical extension of the procedural default rule by forcing defendants to establish a new rule on direct appeal, rather than on collateral attack, if they wish to rely on such a rule. Because of the similarities between the two doctrines, it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the "new rule" doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Adams is also important for another reason: given the particular facts of *Adams*'s own case, the Court's disposition of the case presupposes a judgment about the importance of *Caldwell* error to a sentencing determination. In *Adams*, as the Court noted, the trial judge "found an equal number of aggravating and mitigating circumstances." The Court made clear that there was no fundamental miscarriage of justice even though *Caldwell* error goes to the accuracy of the sentencing procedure, and even though the case was a close one. In short, the mere possibility of a close case did not make the alleged error's threat to accuracy sufficiently fundamental to warrant exemption from the procedural bar.

Sawyer's *Caldwell* claim runs into comparable problems when analyzed in light of the second *Teague* proviso. Sawyer can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet, as we have already stated, the Court's *Teague* opinion makes quite clear that not every procedural rule affecting the accuracy of a trial will fit within the "ordered liberty" proviso. To hold otherwise would be to cling to "jot-for-jot" or "tail-with-the-hide" incorporation, and to make the "extraordinary case into the ordinary one." Instead, the examples listed by the *Teague* Court—trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture—either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's *Caldwell* claim has neither the over-

whelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second *Teague* proviso.

Our extended exposition of the nature of *Caldwell* error reinforces the inferences we draw from the Supreme Court's decision in *Adams*. *Caldwell* error does indeed implicate core aspects of the sentencing procedure. As such, it implicates both the integrity of that procedure and the accuracy of the determination in any particular case. Yet to say that accuracy is implicated is not to say that the defendant is necessarily prejudiced. In fact, *Caldwell*'s deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding. It is, of course, unusual to presume the existence of reversible error, on the basis of the prosecutor's comments, absent any showing of prejudice. This presumption is an important one, and, we would hope, will contribute to the increased integrity and accuracy of criminal procedure in this sensitive area. But none of this makes *Caldwell* so fundamental, or so connected with factual innocence, as to fit within *Teague*'s second proviso.

VI

[20] Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we,

after a thorough review of the record, can find none.

We have covered considerable ground about the content of the *Caldwell* rule. Yet, the dissent falls silent on this set of issues, perhaps because the posture of the case does not require that we apply *Caldwell*. It is then only on narrow, but crucial grounds, that our opinion is engaged, and to assist its focus we conclude with one observation in reply to the dissenting view.

Judicial tradition demands that new rules find their trace in older ones. This search is near the core of discipline that distinguishes judges from other decision makers. Judges excel at the task. Such artisans possess a very important tool—a gauge of generality. It is no surprise then that *Teague*'s effort to limit federal habeas by asking whether a rule is new invites those who resist the restriction to reach for their tool kit. At a sufficient level of abstraction there are no new rules. The judicial artisan can start by asserting that the old rule is that a trial must be fundamentally fair, that a defendant is entitled to procedural due process. Stated this generally there have been few if any new rules for the trial of criminal cases.

The dissent does precisely this, resting its assertions on little more than that the old rule is the prohibition of unfair jury argument. Its old law is unnarrowed by any definition of its reach and force such as whether it treats such state conduct as inherently destructive of required fairness or insists on demonstrated prejudice in a given case. Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without *Caldwell*. Nonetheless, we are told that *Caldwell* was dictated by precedent, that it broke no new ground and that it imposed no new obligation on the

states. We are asked to believe that *Caldwell* simply applied well established constitutional principles. If to the uninitiated this is dissemblance, unhappily it is to the cognoscenti business as usual. By adroit use of the generality gauge our able dissenting colleagues can breathe superficial credibility into the fable that *Caldwell* broke no new ground, imposed no new obligation on the states and was dictated by precedent. With all deference, there is afoot here no more than a resistance to the principles of finality adopted by *Teague*. We should not play such sophistical games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created. We are persuaded that little or nothing is left of *Teague*'s promise if the dissent's view is accepted. We think that this artisan's destruction of so recent a decision by the Supreme Court should be rejected and we do so. Ultimately only *Teague*'s authors can tell us if they meant what they said or if they have changed their minds.

For these reasons, we find that *Teague* bars Sawyer from pursuing his *Caldwell* claim. We affirm the district court's decision denying Sawyer's petition for a writ of habeas corpus.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

Sawyer has been found guilty of capital murder. He does not contest his guilt. The only issue before the en banc court is whether he is entitled to have a properly instructed jury determine that he should be executed by the State or spend the rest of his life in jail, without the benefit of proba-

tion or parole.¹ Whatever we decide, he will not be set free.

The majority has rejected the interpretation of *Caldwell v. Mississippi*² on which the State relied in urging that we deny Sawyer's petition for habeas relief. The majority concludes, however, that the State may execute Sawyer, regardless of the merits of his *Caldwell* claim, because *Caldwell* established a "new rule" in constitutional law and, under the Supreme Court's recent decision in *Teague v. Lane*,³ Sawyer may not receive the benefit of its application because his conviction became final before *Caldwell* was decided.

If, as the majority admits, "it is not clear how *Caldwell* ... fits into the *Teague* scheme" because of the "newness of the amalgam" of standards *Teague* set on "uncertain precedential footing," we do not see why it is incumbent on us to condemn Sawyer to die instead of ordering the State to put the life-or-death issue to a jury that is not only not misled but is fully informed of its responsibilities. In contrast to the majority's ambivalence, we harbor no doubt that Sawyer is entitled to the constitutional protections guaranteed by the eighth amendment: *Caldwell* did not establish a "new rule," and even if it did, *Teague* requires its retroactive application. We, therefore, respectfully dissent.

I.

Although the majority opinion contains a lengthy exegesis on the role of the jury and the nature of *Caldwell* error, it does not reach the merits of Sawyer's claim. We would find that on the facts of Sawyer's case, his sentence is invalid under *Cald-*

well. The prosecutor, in describing the jury's role, remarked:

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).*

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't

1. See La.Rev.Stat. Ann. 14:30(C) (1980).

2. 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

3. — U.S. —, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that you do have the courage of your convictions (emphasis supplied).

The prosecutor's arguments in Sawyer's case fall squarely within *Caldwell*'s prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility in capital sentencing. The trial court

did not correct these statements, and because we cannot say that these comments had no effect on the jury's decision, we would vacate Sawyer's sentence and grant him a new sentencing hearing.⁴

II.

Whether Sawyer may receive the benefit of the constitutional protection enunciated in *Caldwell* depends, however, on the threshold determination that *Caldwell* established a "new rule." Conceding that "[i]t is ... often difficult to determine when a case announces a new rule," the plurality in *Teague* nevertheless offered the following explanation: "In general ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result is not dictated by precedent existing at the time the defendant's conviction became final."⁵

The plurality recognized that constitutional rules will fall along a "spectrum"—from those that fit neatly within the rubric of settled law to those that constitute a clear break from prior precedent—but provided little additional guidance for determining at which point a rule is not "dictated" by precedent and, therefore, "new" for retroactivity purposes.⁶

In *Penry v. Lynaugh*,⁷ however, the Court began to elaborate the meaning of the term "new rule." The Court held that although it had previously found the Texas

4. See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

5. *Id.*, — U.S. at —, 109 S.Ct. at 1070 (O'Connor, J., plurality opinion) (emphasis in original) (citations omitted).

6. See *ibid.*

7. — U.S. —, 109 S.Ct. 2934, — L.Ed.2d — (1989).

sentencing scheme facially valid,⁸ the scheme, as applied to Penry, unconstitutionally limited the jury's ability to consider certain, relevant mitigating evidence.⁹ The Court held that this determination did not constitute a "new rule" given the requirement that capital sentencing procedures permit the sentencing jury to consider and give effect to all relevant mitigating evidence.¹⁰

The Court reasoned that a rule is not "new" for purposes of retroactivity analysis when it "fulfill[s] the assurance" upon which a previous case "was based," or merely "interpret[s] broadly" that previous case.¹¹ The Court thus made clear that its "dictated by precedent" language was not intended to categorize as "new" every rule that does not fit precisely within the pattern of a previously decided case. Rather, the Court recognized that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not "new." To define "new" rules more broadly would depart significantly from the traditional understanding of con-

stitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.¹²

This differentiation between elaborating and applying established principles, on the one hand, and announcing new rules that are dissonant with prior understandings of the law, on the other hand, derives directly from Justice Harlan's view of retroactivity that the Court adopted in *Teague* and applied in *Penry*. Justice Harlan observed "that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles . . . whose meanings are altered slowly and subtly as generation succeeds generation."¹³ He reasoned that such rules are not "new" and should be given retroactive application in habeas proceedings because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final."¹⁴

Caldwell held that a prosecutor may not "le[a]d" a jury to "believe" that it is not "responsib[le] for determining the appropriateness of [a] defendant's death."¹⁵ The Court based this rule upon its belief

8. See *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

9. *Penry*, — U.S. at —, 109 S.Ct. at 2951.

10. *Id.* at —, 109 S.Ct. at 2943-47; see *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

11. *Penry*, — U.S. at —, 109 S.Ct. at 2945.

12. See *Yates v. Aiken*, 484 U.S. 211, —, 108 S.Ct. 534, 538, 98 L.Ed.2d 546 (1988); *Truesdale v. Aiken*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987); *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 714, 93 L.Ed.2d 649 (1987); *Allen v. Hardy*, 478 U.S. 255, 258, 106 S.Ct. 2878, 2880, 92 L.Ed.2d 199 (1986);

Shea v. Louisiana, 470 U.S. 51, 57, 105 S.Ct. 1065, 1068, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 549-50, 102 S.Ct. 2579, 2586-87, 73 L.Ed.2d 202 (1982); *Solem v. Stumes*, 465 U.S. 638, 662, 104 S.Ct. 1338, 1352, 79 L.Ed.2d 579 (1984) (Stevens, J., dissenting); see also Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U.Chi.L.R. 719, 749-54 (1966).

13. *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting).

14. *Id.* at 264, 89 S.Ct. at 1041.

15. *Caldwell*, 472 U.S. at 329, 105 S.Ct. at 2639.

that such prosecutorial misconduct "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability'" in capital sentencing, and that such conduct, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment."¹⁶ Arguments that seek to diminish the jury's sense of responsibility, the Court explained, undermine core eighth amendment values:

The "delegation" of sentencing responsibility that the prosecutor here encouraged . . . would deprive [the defendant] of . . . [the] right to a fair determination of the appropriateness of his death . . . for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed

"(those) compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁷

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence. The *Caldwell* Court fulfilled the assurance enunciated in *Furman v. Georgia*¹⁸ and *Gregg v. Georgia*¹⁹ that capital punishment not be administered "wantonly" or "freakishly" or in an "arbitrary and capricious manner;"²⁰ it applied the "need for reliability in the determination that death is the appropriate punishment in a specific case," assured in *Woodson v. North Carolina*,²¹ *Lockett v. Ohio*,²² and *Eddings v. Oklahoma*,²³ to a situation in which that reliability was compromised; it fulfilled the promise of *Woodson*, *Lockett*, and *Eddings* that a defendant be sentenced to death only after an individualized determination of his moral culpability;²⁴ and it applied the need first articulated in *McGautha v. California*²⁵ that jurors be "confronted with the truly awesome responsibility of decreeing

16. *Id.* at 340, 105 S.Ct. at 2645 (footnote omitted) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, J., plurality opinion)); see *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

17. *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640 (quoting *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

18. 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

19. 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

20. *Gregg*, 428 U.S. at 188, 96 S.Ct. at 2932 (Stewart, J., plurality opinion) (citing *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763 (Stewart, J., concurring)).

21. 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, J., plurality opinion).

22. 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978) (Burger, C.J., plurality opinion).

23. 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982).

24. See *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion); *Lockett*, 438 U.S. at 601-05, 98 S.Ct. at 2963-65 (Burger, C.J., plurality opinion); *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; see also *Stanford v. Kentucky*, — U.S. —, 109 S.Ct. 2969, — L.Ed.2d — (1989) (O'Connor, J., concurring); *South Carolina v. Gathers*, — U.S. —, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

25. 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

death for a fellow human"²⁶ to a case in which the prosecutor specifically instructed the jury that it had no such responsibility. With due respect to the three dissenters in *Caldwell*, it is difficult to imagine the Court reaching any other conclusion given these precedents.

There was, moreover, no precedent inconsistent or dissonant with *Caldwell* at the time it was decided. While the Court, in *Donnelly v. DeChristoforo*,²⁷ had imposed a more stringent due-process test for claims of improper argument made at the guilt/innocence phase of trial, this analysis applied neither to improper argument at sentencing proceedings nor to argument implicating "specific guarantees of the Bill of Rights."²⁸ The *Donnelly* Court thus left open the possibility that improper arguments at sentencing not violative of the Due Process Clause may be held to contravene the eighth amendment's requirements.

Similarly, in *California v. Ramos*,²⁹ the Court posited its approval of jury instructions containing information regarding postconviction procedures on the fact that the information was both relevant and accurate.³⁰ While the Court in *Ramos* did not address whether a prosecutor violates the Constitution by presenting irrelevant and misleading information concerning post-conviction proceedings, its emphasis on the nature of the instruction forecast that such information would be found to undermine the reliability of the sentencing

process by injecting into it an arbitrary factor in violation of the eighth amendment.³¹

If, as the Court in *Penry* instructed, we should consider a case "dictated by precedent" and not "new" for retroactivity purposes when it "fulfill[s] the assurance[s]" of or "interpret[s] broadly" principles articulated in a previous case,³² it is difficult to see how the majority may conclude that *Caldwell* announced a "new rule." *Caldwell* fulfilled the assurance of and interpreted faithfully the settled principle in eighth amendment jurisprudence that a verdict of death must rest upon the reliable determination of a jury accurately informed of its "awesome responsibility;" the same line of eighth amendment cases that compelled the result in *Penry* thus compelled the result in *Caldwell*.

The majority contends that the foregoing analysis unduly restricts the scope of *Teague*. Its criticism of our interpretive method is misdirected, however, for the majority's dispute is not, in reality, with our interpretation of *Teague*, but with *Penry*'s elaboration of the "new rule" standard set forth in *Teague*. Indeed, the majority's criticism of our analysis echoes precisely Justice Scalia's dissent in *Penry*.³³ In admonishing us to wait for "*Teague*'s authors [to] ... tell us if they meant what they said," the majority ignores the fact that *Teague*'s authors have already spoken in *Penry* and have effectively rejected any

26. *Id.* at 208, 91 S.Ct. at 1467.

27. 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

28. *Id.* at 643, 94 S.Ct. at 1871.

29. 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

30. *Id.* at 1004, 1009, 1012, 103 S.Ct. at 3455, 3457, 3459.

31. See *Caldwell*, 472 U.S. at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ramos*, 463 U.S. at 999, 1010, 103 S.Ct. at 3451, 3458).

32. *Penry*, — U.S. at —, 109 S.Ct. at 2944.

33. *Id.* at —, 109 S.Ct. at 2963.

definition of a "new rule" that would sweep broadly enough to encompass *Caldwell*.

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than *Penry*'s, for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*. Indeed, the Court in *Caldwell* observed that after *Furman*, several state supreme courts—including Louisiana's—had anticipated *Caldwell* and found that *Caldwell*-type errors undermined the validity of a death sentence;³⁴ it noted that some state courts had prohibited such arguments in both capital and noncapital cases even before *Furman*.³⁵

At least five years before the Supreme Court decided *Caldwell*, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor into the jury's decision and invalidated the sentence. In 1980, when denying an application for rehearing in *State v. Berry*,³⁶ the Louisiana Supreme Court recognized

[a]ny prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message

that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, ... then the defendant has not had a fair trial in the sentencing phase, and the penalty should be vacated.... The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.³⁷

In 1982, in *State v. Willie*,³⁸ the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing when the prosecutor referred to appellate review and told the jury that "the buck really don't [sic] stop with you. The buck starts with you.... [W]hat I'm asking you to do is start the buck rolling."³⁹ The court quoted *Berry*, and added:

This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence

of rehearing); *State ex rel. Williams v. Blackburn*, 396 So.2d 1249, 1250 (La.1981) (Dennis, J., dissenting from denial of stay); *id.* at 1250 (Calogero, J., concurring in denial of the stay); *State v. Monroe*, 397 So.2d 1258, 1270 (La.1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1411 (1983).

38. 410 So.2d 1019 (La.1982), cert. denied, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 723 (1984).

39. *Id.* at 1034.

34. *Caldwell*, 472 U.S. at 333-34 & n. 4, 105 S.Ct. at 2642 & n. 4 (citing cases).

35. *Id.* at 334 & n. 5, 105 S.Ct. at 2642 & n. 5 (citing cases).

36. 391 So.2d 406 (La.1980) (denial of application for rehearing), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

37. *Berry*, 391 So.2d at 418 (emphasis in original) (portions of text omitted); see *id.* at 419-21 (Calogero, J., dissenting from denial

of death is appropriate is not entirely the jury's responsibility.⁴⁰

In *State v. Robinson*,⁴¹ also in 1982, the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing because the prosecutor referred repeatedly to the jury's sentence as a "recommendation" that did not have a "strong possibility" of "get[ting] through all of that [appellate] review."⁴² Citing *Berry* and *Willie*, the court anticipated the "no effect" test required by the eighth amendment, stating:

The closing argument requires that the death sentence be set aside, because this court cannot determine that misleading and improper remarks of this magnitude did not influence the jury's recommendation.... [W]e cannot say that the jury's sentencing discretion was unaffected by the prosecutor's repeated and often misleading references to the largely irrelevant consideration of appellate review of death sentences.⁴³

As the Louisiana Supreme Court observed, *Caldwell* neither imposed a new obligation on prosecutors or courts nor broke new ground in Louisiana.⁴⁴ Before the Supreme Court decided *Caldwell*, Louisiana had already prohibited *Caldwell* argument and required reversal of sentences when it found such error. Moreover, in finding that *Caldwell* argument injected an arbitrary factor into the sentencing process, the Louisiana courts relied on the same eighth amendment principles that

compelled the Supreme Court's decision in *Caldwell*. In *State v. Sonnier*,⁴⁵ the Louisiana Supreme Court stated that under Louisiana law, the court "is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor."⁴⁶ The court described how Louisiana modelled its provision for independent appellate review of death sentences on the Georgia procedure sanctioned in *Gregg v. Georgia*, and cited approvingly the Georgia Supreme Court's reversal of a death sentence when it found that "an unobjected to argument by a [prosecutor] may have influenced the jury to impose a more severe sentence than unbiased judgment would have given."⁴⁷ In *Willie*, the court again adverted to *Gregg*'s requirement that a sentencer's discretion be channelled to avoid arbitrary and capricious imposition of the death penalty, and held that the prosecutor's improper argument regarding appellate review "lessened" the jurors' appreciation of their "awesome responsibility" and "created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors."⁴⁸ Echoing *McGautha*, the Louisiana Supreme Court thus anticipated almost exactly Justice O'Connor's conclusion in *Caldwell* that such arguments "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' ... or through 'whim ... or

40. *Id.* at 1035; see *State v. Clark*, 492 So.2d 862, 870-71 (La.1986).

41. 421 So.2d 229 (La.1982).

42. *Id.* at 231-33.

43. *Id.* at 233-34 (portions of text omitted).

44. See *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988).

45. 379 So.2d 1336 (La.1979).

46. *Id.* at 1371.

47. *Id.* at 1370-71 & n. 4.

48. *Willie*, 410 So.2d at 1032, 1034.

mistake."⁴⁹

The majority concedes that numerous states, including Louisiana, forecast *Caldwell* by prohibiting the arguments that the *Caldwell* Court ultimately barred, but concludes that because states' *Caldwell* precursors did not impose an independent constitutional constraint on state power, they are irrelevant to *Teague*'s analysis. That the state courts adopted these rules before *Caldwell* to conform state law to perceived eighth amendment requirements, rather than conforming to an independent federal constitutional constraint articulated by the Supreme Court, is a distinction without a difference for the purpose of determining whether *Caldwell* announced a "new rule." In either case, the state courts based their interpretations on the eighth amendment, and their widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

In *Dugger v. Adams*,⁵⁰ the Supreme Court found these state laws sufficiently established to conclude that the legal basis for raising a *Caldwell*-type claim prior to *Caldwell* was "reasonably available to counsel," and that *Caldwell* was, therefore, of such vintage as to be subject to the

procedural-bar rule.⁵¹ In *Moore v. Blackburn*,⁵² we considered a writ application based on *Caldwell* barred by the abuse-of-writ doctrine for the same reason. If both the Supreme Court and this court have considered, on the basis of state laws anticipating *Caldwell*, a *Caldwell*-type claim sufficiently established to negate cause for failing to raise it years before *Caldwell*, how may we now ignore these state laws and conclude that *Caldwell* is novel?

Contrary to the majority's assertion, the *Teague* plurality's citation of *Ford v. Wainwright*⁵³ as an example of a "new rule" does not establish that state rules are irrelevant to determining whether a rule is "new."⁵⁴ In *Ford*, the Court looked to state law for "objective evidence of contemporary values"⁵⁵ and noted that 26 states had enacted statutes prohibiting the execution of insane persons while other states adhered to the common law principle prohibiting such executions.⁵⁶ Although the *Teague* plurality did not explain why *Ford* should be considered a "new rule," the Court's discussion in *Penry* suggests that any substantive eighth amendment rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or because of the nature of their offense" will be "new" because of its sweeping and categorical nature,⁵⁷ even

49. *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451, and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

50. — U.S. —, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

51. *Id.* at —, 109 S.Ct. at 1215-17.

52. 774 F.2d 97 (5th Cir.1985), cert. denied, 476 U.S. 1176, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986).

53. 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

54. See *Teague*, — U.S. at —, 109 S.Ct. at 1070.

55. *Ford*, 477 U.S. at 406, 106 S.Ct. at 2600.

56. *Id.* at 408-09 & n. 2, 106 S.Ct. at 1071 & n. 2.

57. *Penry*, — U.S. at —, 109 S.Ct. at 2951 (citations omitted). Such a rule would, however, necessarily fall within the first exception to *Teague* and would be applied retroactively. See *ibid.*

though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn such punishment.⁵⁸ The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

The *Teague* plurality's citation of *Ford* cannot, therefore, be construed as a broad holding regarding the proper role of state law in determining whether a rule is "new." At most, *Teague*'s citation of *Ford* indicates that the existence of state common law and statutes embodying principles later incorporated into eighth amendment law does not preclude a finding that the rule is nevertheless "new." It does not command us to ignore state law and, in particular, it does not indicate that state court interpretations of the federal Constitution are irrelevant to determining whether a rule is "new" under *Teague*.

Indeed, the majority's refusal to address the import of a state's interpretation of the federal Constitution misconstrues the basis of *Teague*'s retroactivity principles. The plurality opinion in *Teague* anchored its retroactivity analysis, the majority recognizes, in the principles of federalism and finality; it sought to mitigate the uncertain effect of new and unanticipated obligations on final state court judgments.⁵⁹ The ma-

jority ignores, however, a basic precept of federalism that animated the *Teague* plurality: state courts, no less than federal courts, may meaningfully interpret the federal Constitution. "It is intolerable," Justice Harlan asserted, "that [the Supreme Court] take to [itself] the sole ability to speak to . . . issues of federal constitutional law;" the decision of an "inferior" court, "cognizant of the Federal Constitution and duty bound to apply it," should not be deemed "forever erroneous because years later [the Supreme] Court took a different view of the relevant constitutional command."⁶⁰ The majority's failure to acknowledge and give effect to Louisiana's prohibition of *Caldwell*-type error prior to *Caldwell* minimizes the role of state courts in our federal constitutional framework and devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms.⁶¹

Sawyer did not raise his *Caldwell* claim on direct review, and, on collateral review, the Louisiana courts summarily rejected the argument on its merits. Although our conclusion on the merits of Sawyer's claim differs from that reached by the Louisiana courts on collateral review, we rely on the same constitutional principles that the state courts considered, not on some "new" constitutional rule unanticipated by the Louisiana Supreme Court. An advocate of even the narrowest view of the appropriate role

58. *Ibid.*; see *Stanford v. Kentucky*, — U.S. —, 109 S.Ct. 2969, 2975, — L.Ed.2d —, — (1989); *Thompson v. Oklahoma*, 487 U.S. —, 108 S.Ct. 2687, 2691, 101 L.Ed.2d 702 (1988); *Enmund v. Florida*, 458 U.S. 782, 788-96, 102 S.Ct. 3368, 3371-76, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 2866-68, 53 L.Ed.2d 982 (1977).

59. *Teague*, — U.S. at —, 109 S.Ct. at 1070-75 (O'Connor J., plurality opinion).

60. *Mackey v. United States*, 401 U.S. 667, 680, 689-90, 91 S.Ct. 1160, 1174, 1178, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in the judgment).

61. See Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

of collateral review could not maintain that principles of federalism and finality preclude habeas relief whenever a federal court, applying the same constitutional principles as the state court, reaches a different conclusion on the merits of a petitioner's claim. This minimal "backstop" function of collateral review to which the majority refers remained untouched by *Teague*.

We are aware that the Court's decision in *Penry* implies that the "new rule" analysis is properly focused on one state when the proposed rule is directed at the procedure of a particular state, but may be broader when the proposed rule would apply to all states.⁶² We, therefore, do not suggest that Louisiana's anticipation of *Caldwell* is dispositive⁶³ of whether *Caldwell* was a new rule, for *Caldwell* error is not restricted to Louisiana's sentencing procedure. At a minimum, however, the adoption of *Caldwell*-type rules by numerous states, including Louisiana, prior to *Caldwell* reveals the degree to which the Court's eighth amendment jurisprudence compelled the result reached in *Caldwell*.

III.

Even if *Caldwell* announced a new rule, it nevertheless should be applied to cases on collateral review because it falls within the exception provided by *Teague* for new rules requiring the observance of "those

procedures that . . . are implicit in the concept of ordered liberty," that "implicate the fundamental fairness of the trial," and, "without which the likelihood of an accurate conviction is seriously diminished."⁶⁴

The plurality in *Teague* diverged from Justice Harlan's approach to retroactivity by adding an "accuracy" qualification to the "fundamental fairness" exception, implying that only those rules touching on factual innocence would fall within it.⁶⁵ While Justice Harlan had subscribed to this view in his dissent in *Desist*,⁶⁶ he subsequently rejected it in *Mackey*, acknowledging that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."⁶⁷ The majority admits that the *Teague* plurality's modification of Justice Harlan's second exception does not command a majority of the Court, and although a solid majority of the Court employed *Teague*'s retroactivity analysis in *Penry*, *Penry* did not address the *Teague* plurality's gloss of the fundamental fairness exception.⁶⁸

The Court's unanimous recognition in *Penry* that *Teague*'s first exception encompasses a distinct eighth amendment component⁶⁹ suggests that the Court would find a parallel component in *Teague*'s second exception, and exempt from *Teague*'s nonretroactivity rule those capital sentencing procedures that ensure the "accuracy" of the sentencer's determina-

62. See *Penry*, — U.S. at —, —, 109 S.Ct. at 2943-47, 2951.

63. See *Teague*, 109 S.Ct. at 1070 (citing *Ford*, 477 U.S. at 410, 106 S.Ct. at 2602).

64. *Teague*, — U.S. at —, 109 S.Ct. at 1075-77 (O'Connor, J., plurality opinion) (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (Harlan, J., concurring in the judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937))).

65. See *Teague*, — U.S. at —, 109 S.Ct. at 1080 (Stevens, J., concurring in part and concurring in the judgment).

66. See *Desist*, 394 U.S. at 262, 89 S.Ct. at 1041 (Harlan, J. dissenting).

67. *Mackey*, 401 U.S. at 694, 91 S.Ct. at 1181 (Harlan, J., concurring in the judgment).

68. See *Penry*, — U.S. at —, —, 109 S.Ct. at 2943, 2953.

69. *Ibid.*

tion. The plurality in *Teague* acknowledged that "a criminal judgment necessarily includes the sentence imposed."⁷⁰ Both the plurality and dissent in *Teague* would, therefore, agree that *Teague*'s exemption of new rules that ensure the accuracy of the determination of the defendant's guilt or innocence includes new rules that ensure the accuracy of the sentencer's determination that a particular defendant deserves the death penalty.⁷¹

The rule *Caldwell* announced, based on the "heightened 'need for reliability'" in capital sentencing,⁷² satisfies *Teague*'s second exception: *Caldwell* error undermines the eighth amendment's requirement that responsible jurors produce individualized, reliable verdicts, and thus seriously diminishes the likelihood of an accurate sentence. As Justice O'Connor emphasized in her concurrence in *Caldwell*: "[T]he prosecutor's misleading emphasis on appellate review misinformed the jury, ... creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously' ... or through 'whim or mistake.'"⁷³ For the majority to ignore the effect of *Caldwell* error on the reliability and accuracy of the sentence seriously misapprehends the nature of a *Caldwell* violation and the reasons behind the Court's decision to prohibit it.

To justify its conclusion that *Caldwell* does not satisfy *Teague*'s second excep-

tion, the majority relies primarily on *Dugger v. Adams*,⁷⁴ in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice."⁷⁵ Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*-[ordered] liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Whether or not the principles underlying the procedural default and retroactivity doctrines are similar, there is a substantial difference between denying a particular petitioner the benefit of a rule based on the unique facts of his case, and holding that no petitioner, whatever his situation, may benefit from retroactive application of the rule to his case. The Court recognized this distinction in *Adams*, stating that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received."⁷⁶ Under *Teague*, we must address the nature of *Caldwell* error, not the specific facts of Sawyer's case.

The majority conflates the individual and the categorical in order to obscure the ulti-

70. *Teague*, — U.S. at — n. 3, 109 S.Ct. at 1077 n. 3 (O'Connor, J., plurality opinion).

71. See *ibid.*; *id.* at — n. 5, 109 S.Ct. at 1089 n. 5 (Brennan, J., dissenting); cf. *Adams*, — U.S. at —, 109 S.Ct. at 1217-18 n. 6; *id.* at — n. 4, 109 S.Ct. at 1219 n. 4 (Blackmun, J., dissenting); *Ramos*, 463 U.S. at 1007-09, 103 S.Ct. at 3457.

72. *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645 (quoting *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

73. *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451 and *Eddings*, 455 U.S. at 119, 102 S.Ct. at 879).

74. — U.S. —, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

75. *Id.* at — n. 6, 109 S.Ct. at 1217-18 n. 6.

76. *Ibid.*

mate import of its holding—that the eighth amendment values *Caldwell* articulated constitute an unwarranted innovation in eighth amendment jurisprudence and are insignificant in the pantheon of values present in criminal procedure. *Caldwell* is worthy of higher esteem, for the Supreme Court found *Caldwell* error so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state demonstrated otherwise.⁷⁷ Not all errors in the capital sentencing context are so critical. For example, a death sentence based on an aggravating factor invalid under state law, but supported by evidence properly before the sentencer, does not sufficiently implicate the accuracy of the sentencing process to warrant a presumption of prejudice.⁷⁸ Prejudice is assumed, however, when the sentencer has not been allowed to consider or give effect to relevant mitigating evidence,⁷⁹ when an aggravating factor is premised on incorrect or invalid evidence,⁸⁰ or when the jury's sense of responsibility has been undermined.⁸¹

IV.

The majority acknowledges that the death penalty "is different from all other

[punishments] in many respects." Yet, by denying that *Caldwell* interpreted and applied consistently the Court's eighth amendment jurisprudence to new facts, and by refusing to accord the heightened need for reliability in capital sentencing a role in *Teague*'s fundamental fairness exception, the majority eviscerates the procedural protections on which the constitutionality of this ultimate and irreversible penalty is premised. The majority has, in effect, given finality concerns greatest force in the area where the eighth amendment requires that we be most wary. We cannot agree that a state's interest in the finality of a judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, execution of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule,⁸² to prevent us from applying *Caldwell*, which is at most an extension of settled doctrine. If any case should be considered as having established a new rule not retroactively

77. *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

78. See *Barclay v. Florida*, 463 U.S. 939, 956-57, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens*, 462 U.S. 862, 887-88, 103 S.Ct. 2733, 2748, 77 L.Ed.2d 235 (1983).

79. See *Hitchcock v. Dugger*, 481 U.S. 393, 397, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

80. See *Johnson v. Mississippi*, 486 U.S. —, —, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988).

81. See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

82. See *Teague*, — U.S. at — nn. 3 & 4, 109 S.Ct. at 1086 nn. 3 & 4 (Brennan, J., dissenting); compare *id.* at —, 109 S.Ct. at 1060-78 (O'Connor, J., plurality opinion) with *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Desist*, 394 U.S. 244, 89 S.Ct. 1030; *Mackey*, 401 U.S. 667, 91 S.Ct. 1160; *Solem*, 465 U.S. 638, 104 S.Ct. 1338.

applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of Sawyer's case and 8½ years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

United States Court of Appeals

FIFTH CIRCUIT

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March 30, 1989

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No. 87-3274 - Sawyer v. Butler

(USDC No. CA-86-0223-"I"(4))

Dear Counsel:

The En Banc court requests that counsel in this case submit additional briefs discussing the relevance of the Supreme Court's recent decision in *Teague v. Lane*, 57 U.S.L.W. 4233 (1989), to Sawyer's petition. The Court wishes to know whether *Teague* precludes Sawyer from raising *Caldwell* issues in a collateral attack on his conviction. Counsel should address the following questions, although they need not limit themselves to these questions:

1. Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test? In answering this question, please discuss the significance of the Louisiana cases dealing with prosecutorial argument that diminishes the responsibility of a capital jury. See, e.g., *Steve v. Willie*, 410 So.2d 1019 (La. 1982). The Court wishes to know whether these cases rest upon state law rules, or upon the Eighth Amendment to the Constitution, and what effect, if any, they have upon the newness of Sawyer's *Caldwell* claim for *Teague* purposes.

-1-

2. Does Teague apply to collateral attacks upon a sentencing proceeding in a capital case?

3. Does Caldwell announce a rule that falls within the "fundamental fairness" exception to the Teague rule?

Sawyer's brief should be filed on or before May 12. Louisiana's brief should be filed on or before May 19.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

by Amanda K. Vockroth
Amanda K. Vockroth
Case Manager

AKV/dme

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[Closing Arguments and Jury Instructions in the Sentencing Hearing]

Argument by the state from 4:15 p.m. to 4:25 p.m.
as follows:

MR. BOUDOUSQUE:

Ladies and gentlemen, we are now at the second phase of the proceedings you were told about during the course of the voir dire. You will decide if the crime and relating circumstances fit into technical

1 definition of the law. The law states that the
2 sentence of death shall not be imposed unless the
3 jury finds beyond a reasonable doubt that at least
4 one statutory aggravating circumstance exist and
5 after consideration any mitigating circumstances
6 recommends the sentence of death be imposed. The jury
7 shall be furnished a copy with the statutory
8 aggravating and mitigating circumstances. The State is
9 going to contend there are four aggravating
10 circumstances that the jury can find without a
11 reasonable doubt. One, the following shall be
12 considered, aggravating circumstance. When the
13 offender is engaged in the perpetration or the
14 attempted perpetration of an aggravated rape or an
15 aggravated arson. Just the facts of the crime alone
16 can be considered as an aggravating circumstance. Two,
17 where the offender has been previously convicted of an
18 unrelated murder, aggravated rape, aggravated
19 kidnapping or has a significant prior history of
20 criminal activity.

21 Well you have heard Robert Sawyer own sister
22 tell you that he has been a follower of the law most
23 of his life. You also heard of a 1974 conviction where
24 the defendant took the life of a four year old child,
25 was indicted for second degree murder and was convicted
26 of involuntary manslaughter. Where the offense was
27 committed in an especially heinous and atrocious and
28 cruel manner. (The D.A. displays the photographs.)
29 Need I say more, and where the offender knowingly

1 created a risk of death or great bodily harm to more
2 than one person. There were two small children as
3 well as Cynthia Shano in that house. That will be a
4 question of fact for the jury to decide. The law
5 provides that if you find one of these circumstances
6 then what you are doing as a juror, you yourself will
7 not be sentencing Robert Sawyer to the electric chair.
8 What you are saying to this Court, to the people of
9 this Parish, to any appellate court, the Supreme Court
10 of this State, the Supreme Court possibly of the United
11 States, that you the people as a fact finding body from
12 all the facts and evidence you have heard in
13 relationship to this man's conduct are of the opinion
14 that there are aggravating circumstances as defined by
15 the statute, by the State Legislature that this is
16 the type of crime that deserves that penalty. It is
17 merely a recommendation so try as he may, if Mr.
18 Weidner tells you that each and every one of you I
19 hope you can live with your conscience and try and play
20 upon your emotions, you cannot deny, it is a difficult
21 decision. No one likes to make those type of
22 decisions but you have to realize if but for this man's
23 actions, but for the type of life that he has decided
24 to live, if of his own free choosing, I wouldn't be
25 here presenting evidence and making argument to you.
26 You wouldn't have to make the decision. This man is
27 almost thirty years old, thirty-one years old. He is
28 an adult. You heard his sister testify. I have
29 compassion and I certainly have understanding and some

1 emotions about her feelings. Although I must tell
2 you when I listened to some of the things that she
3 said concerning how beautiful that four year old child
4 was treated that I am somewhat maybe, maybe I was a
5 little harder than I should have been when I asked
6 her questions. For that I apologize, but it was only
7 an instinctive reaction on my part but the facts
8 remain there are many of us in this life, life is not
9 an easy thing but life is the most important thing we
10 know and when someone takes it in his own hands for
11 whatever reason because he wants to get it off and
12 have his joys and jollies, when he decides to take
13 another life into his hands and in this case two within
14 a five year period, then the line has to be drawn.
15 This man is never going to change. He has committed
16 two homicides in five years. You have experienced a
17 certain amount of emotions in this case. I am sure
18 your heart goes out to his sister and maybe to his
19 nephew. During the course of this trial I haven't
20 been so lucky. The only person that I've been able
21 to converse with is Mr. Beckendorf. Frances Arwood
22 is not here. I wish she could tell you what she went
23 through on September 28 when she was locked into that
24 chamber of horrors, when over that extended period of
25 time this man so savagely and brutally along with
26 Charles Lane beat, kicked, poured scalding hot water,
27 raped, set her on fire, see what I'm trying to say,
28 that Frances is not here. I didn't ask her mother to
29 come back. I thought that the emotional aspect of

1 what she had to undergo the first time was enough
2 but think about how she feels. Think about that if
3 that was your child or your wife or your relative.
4 What I'm trying to say is that it is nice and easy
5 to put Frances Arwood in the abstract but she will
6 never know another sunrise. She will not know what
7 is basic to you and me which is living. There is
8 really not a whole lot that can be said at this point
9 in time that hasn't already been said and done. The
10 decision is in your hands. You are the people that are
11 going to take the initial step and only the initial
12 step and all you are saying to this court, to the
13 people of this Parish, to this man, to all the Judges
14 that are going to review this case after this day, is
15 that you the people do not agree and will not tolerate
16 an individual to commit such a heinous and atrocious
17 crime to degrade such a fellow human being without
18 the authority and the impact, the full authority and
19 impact of the law of Louisiana. All you are saying is
20 that this man from his actions could be prosecuted to
21 the fullest extent of the law. No more and no less.
22 I submit to you when you evaluate the facts of this
23 case and you make a comparison with the atrocious
24 nature of the facts of this case, the facts of the
25 case that you heard about when little Laurie Durham,
26 four years old, lost her life, I think you will
27 decide that there are at least three or four
28 aggravating circumstances which you could reasonably
29 impose in order to justify a death penalty verdict.

1 It's all your doing. Don't feel otherwise. Don't
2 feel like you are the one, because it is very easy
3 for defense lawyers to try and make each and every one
4 of you feel like you are pulling the switch. That is
5 not so. It is not so and if you are wrong in your
6 decision believe me, believe me there will be others
7 who will be behind you to either agree with you or to
8 say you are wrong so I ask that you do have the
9 courage of your convictions. You've done the right
10 thing so far. There can be no doubt that Robert
11 Sawyer committed this crime. The evidence is strong
12 and convincing although he still denies that. He
13 still states he was so intoxicated he doesn't
14 remember anything about this crime. He gave a
15 statement two hours after the crime admitting or at
16 least telling everyone about it. I could have cross
17 examined him and gone more and more into it and gotten
18 more and more lies but his guilt has already been
19 decided.

20 I ask that you consider what I have just told you
21 and I may or may not be back to speak to you in a
22 brief rebuttal after Mr. Weidner argues. Thank you.

23 Closing argument by the Defense from 4:25 p.m. to
24 4:35 p.m. as follows:

25 MR. WEIDNER:

26 Ladies and gentlemen, I don't quite know what to
27 say. I have never been in this position before. I
28 guess I am doing exactly what Mr. Boudousque told you
29 I was going to do. The decision whether Robert Sawyer

1 lives or dies is in your hands for one very simple
2 reason. Should you decide today that he gets life
3 imprisonment, well then the issue of whether or not
4 he would be executed never comes up again. The issue
5 remains a life only if you decide that he should be
6 executed. I don't know what I can say for Robert
7 Sawyer. He is a poor miserable little human being.
8 He has had a hell of a life. He was involved in a
9 very heinous act. He has been in a mental hospital.
10 Like Doctor Arneson told you probably a sociopath.
11 We know and it is never been attempted to be rebutted
12 that Mr. Sawyer was intoxicated the day this incident
13 with Frances Arwood occurred. You obviously believe
14 that he is guilty of first degree murder. That is
15 your verdict. How can we believe, I know I can't,
16 anyone in their right mind or in possession of their
17 faculties could do something like this. I personally
18 do not agree with the death penalty. I don't think
19 there is any circumstance when anyone has the right to
20 kill another person no matter how we try to get away
21 from it. That is what we would be doing is killing
22 another person. Charles Lane is serving life
23 imprisonment. I'm going to ask you to give Robert
24 Sawyer the living death of life imprisonment. Don't
25 kill. Thank you.

26 Rebuttal argument by the State from 4:35 p.m. to
27 4:40 p.m. as follows:

28 MR. BOUDOUSQUE:

29 Mr. Weidner states that if you recommend life

1 imprisonment instead of the electric chair then you
2 will never have to worry about the issue of whether
3 or not Mr. Sawyer will receive the chair. At that
4 point in time the only thing you will have to worry
5 about is whether or not Robert Sawyer will ever be
6 back on the streets of Jefferson Parish. The man's
7 personality has already been formed. The statute
8 speaks without benefit of probation, suspension,
9 commutation of sentence. The statute does speak about
10 a pardon. The statute doesn't speak about a
11 commutation so don't think that if you vote for
12 first degree murder, I'm sorry, for life imprisonment
13 that that will be the end of this matter as it
14 relates to Robert Sawyer because it's not. He speaks
15 in terms of his personal feelings of the death penalty.
16 Such a decision is never easy to make but if Louisiana
17 law, if the law which we have in this state is to have
18 any piece, if it's to have any meaning, if it's to have
19 any impact on all the other people out on the streets
20 that are committing crimes and murders and rapes and
21 robberies, that is affecting you and me and every
22 member of your family. That has made the good people
23 of this community become prisoners in their own homes
24 in putting bars up in their own homes. They are the
25 ones who are suffering. If the statute is to have any
26 weight behind it at all, my God, ladies and gentlemen
27 this is the time to draw the line because if a man
28 can commit this type of crime, do this type of thing
29 to this woman in front of two children with a prior

1 conviction for killing a four year old child, then
2 what are the people of this Parish to believe. They
3 are going to believe what a lot of people believe,
4 there is a lot of law and a lot of judges but the judges
5 are letting the criminals out, the law never has any
6 affect. Don't you see that the criminal justice
7 system, ladies and gentlemen, is not the courts, it's
8 not the judges, it's not technicalities of defense
9 lawyers, it is nothing more than people like you and
10 me and if you are not capable of making these types of
11 decisions so well then you are right, there will be
12 a breakdown and there has been a breakdown but I will
13 tell you what imperfect is, the system is. At least
14 this man has had the occasion to be judged by twelve
15 men of his peers, twelve men and women of his peers
16 and in some other countries he may have been taken
17 out and summarily executed. He has had the due process
18 of law and then he expects you because Charles Lane
19 he did that for a reason because he wants to say well
20 Charles Lane got life imprisonment upon conviction of
21 first degree murder but this man should get the same.
22 Well if I were to tell you that Charles Lane, that I
23 was the prosecutor in that case and the evidence that
24 was presented for Charles Lane, Charles Lane never had
25 a conviction.

26 MR. WEIDNER:

27 Objection.

28 THE COURT:

29 The Court sustains that.

1 MR. BOUDOUSQUE:

2 There are aggravating circumstances possibly Mr.

3 Lane did not have.

4 MR. WEIDNER:

5 Objection again.

6 MR. BOUDOUSQUE:

7 I'm talking about aggravating circumstances.

8 THE COURT:

9 You can argue that.

10 MR. BOUDOUSQUE:

11 There are certain aggravating circumstances that
12 are involved and maybe the jury didn't find that those
13 aggravating circumstances existed and maybe the jury
14 found that as a matter of fact he was a passing
15 participant and not the main activist in this heinous
16 chain of events. This is the man. He is the one and
17 I think in your heart you know that no matter how
18 unpleasant or how difficult this type of decision may
19 be for you to make, if you really analyze it you don't
20 have a choice. There is only one verdict that can be
21 rendered in this case and there will be a strong
22 symbolism related to that penalty. You the people are
23 part of the criminal justice system. You now know how
24 it works. Now is the time and I ask that you
25 recommend because all you are doing is making a
26 recommendation. I ask that you recommend to this
27 Court and to any other Court that reviews Robert
28 Sawyer's case that as a jury based on all the facts
29 and circumstances within your knowledge you recommend

1 the imposition of the death penalty. Thank you.

2 THE COURT:

3 Ladies and gentlemen, before I begin, Charles
4 Lane was not tried in this Court by you and I ask
5 that you disregard any reference to Charles Lane's
6 trial. That trial had nothing to do with or should
7 have nothing to do with your deliberations. Whatever
8 happened to Charles Lane certainly should be of no
9 concern to you. All right.

10 Having found Robert Sawyer guilty of first degree
11 murder you must now determine whether he should be
12 sentenced to death or to life imprisonment without
13 benefit of probation, parole or suspension of
14 sentence. It is your duty to consider the circumstances
15 of the offense and the character and propensities of
16 Robert Sawyer to determine which sentence should be
17 imposed. In reaching your decision regarding the
18 sentence you must be guided by these instructions.
19 You are required by law to consider the existence of
20 aggravating and mitigating circumstances in deciding
21 which sentence to impose. The statutory aggravating
22 circumstances are listed on the sheet of paper you have.
23 The District Attorney contends that four of those
24 circumstances are applicable to this case and if you
25 look at your list you will see A, the offender was
26 engaged in the perpetration or attempted perpetration
27 of aggravated rape or aggravated arson. B, obviously
28 does not apply. C states that the offender was
29 previously convicted of an unrelated murder, aggravated

1 rape or aggravated kidnapping or I say significant
2 prior history of criminal activity. Did the
3 defendant knowingly create a risk of death or great
4 bodily harm to more than one person and if you drop
5 on down to G it states that the offense was committed
6 in an especially heinous, atrocious or cruel manner.
7 Before you decide that a sentence of death should be
8 imposed you must unanimously find beyond a reasonable
9 doubt that at least one statutory aggravating
10 circumstance exist. If you find beyond a reasonable
11 doubt that any of the statutory aggravating circumstances
12 existed you are authorized to consider imposing a
13 sentence of death. If you do not unanimously find
14 beyond a reasonable doubt any of the statutory
15 aggravating circumstances existed the life imprisonment
16 without probation or parole or suspension of sentence
17 is the only sentence that may be imposed. Even if you
18 find the existence of an aggravating circumstance you
19 must also consider any mitigating circumstances before
20 you decide a sentence of death should be imposed.
21 The law specifically list certain mitigating
22 circumstances and you have that list. These
23 mitigating circumstances are A, the offender has no
24 significant prior history of criminal activity. B,
25 the offense was committed while the offender was under
26 the influence of extreme mental or emotional disturbance.
27 C, the offense was committed while the offender was
28 under the influence or domination of another person.
29 D, the offense was committed under circumstances

1 which the offender reasonably believed provide a
2 moral justification or extension of his conduct. F,
3 at the time of the offense the capacity of the
4 offender to appreciate the criminality of his conduct
5 or to conform his conduct to the requirements of law
6 was impaired as a result of mental disease or defect
7 or intoxication. F, the youth of the offender at the
8 time of the offense. G, the offender was a principal
9 whose participation was relatively minor and H, any
10 other relevant mitigating circumstances. You will
11 note that you are authorized to consider any
12 relevant mitigating circumstances. The fact you are
13 given a list of aggravating and mitigating
14 circumstances should not cause you to infer the Court
15 believes that any of these circumstances do or do
16 not exist. The law requires that the jury be given
17 such a list in every case. Whether any of the
18 aggravating or mitigating circumstances exist is a
19 fact for you to determine based upon the evidence
20 presented. In addition to the evidence presented at
21 this sentencing hearing in deciding the sentence to
22 be imposed you may consider evidence presented during
23 the guilt determination trial that was brought you
24 earlier. In just a moment the clerk will hand you
25 two blank forms of verdicts. The first formal
26 verdict reads having found the below listed statutory
27 aggravating circumstance or circumstances and after
28 consideration of the mitigating circumstances offered,
29 the jury recommends that the defendant be sentenced to

1 death. In the event you should unanimously decide
2 the death penalty should be imposed, a space is
3 provided for you to write out the statutory circumstance
4 or circumstances unanimously found to exist. The
5 foreman will sign the form. The second formal
6 verdict reads, the jury unanimously recommends that
7 the defendant be sentenced to life imprisonment without
8 benefit of probation, parole or suspension of sentence.
9 This verdict form is to be used if you cannot
10 unanimously agree that the death penalty should be
11 imposed. If the jury decides that a life penalty
12 without probation or parole or suspension of sentence
13 should be imposed the foreman will sign that formal
14 verdict, no listing of aggravating or mitigating
15 circumstances are required if you use this second
16 verdict form. Nothing said or furnished you in these
17 instructions should be taken as an opinion of the
18 Court as to the existence or not of statutory
19 aggravating or mitigating circumstances. It is your
20 responsibility in accordance with the principles of
21 law I have instructed whether the defendant should be
22 sentenced to death or the life imprisonment. Go with
23 Mr. Miller back in the jury room.

24 (Jury retired at 4:45 p.m. The jury returned at
25 5:20 p.m.)

26 THE COURT:

27 Would you hand Mr. Miller the verdict form.

28 THE BAILIFF:

29 Louisiana versus Sawyer. Verdict, having found

1 the below listed statutory aggravating circumstance or
2 circumstances and after consideration of the
3 mitigating circumstances offered, the jury recommends
4 that the defendant be sentenced to death.

5 Aggravating circumstances found: 1.) The
6 offender was engaged in the perpetration of
7 aggravated arson, 2.) the offender was previously
8 convicted of an unrelated murder, 3.) the offense
9 was committed in an especially heinous, atrocious and
10 cruel manner. Signed Susan B. Roundtree, forewoman.

11 MR. WEIDNER:

12 Would you poll the jury.

13 THE CLERK:

14 Q Mr. Ragas, is that your verdict?

15 A Yes.

16 Q Miss Roth, is that your verdict?

17 A Yes.

18 Q Mr. Andressen, is that your verdict?

19 A Yes.

20 Q Mr. Drumm, is that your verdict?

21 A Yes.

22 Q Mr. Akerman, is that your verdict?

23 A Yes.

24 Q Mr. Cacioppo, is that your verdict?

25 A Yes.

26 Q Mr. Leaber, is that your verdict?

27 A Yes.

28 Q Mr. Pollack, is that your verdict?

29 A Yes.

1 Q Miss Roundtree, is that your verdict?

2 A Yes.

3 Q Mr. Wood, is that your verdict?

4 A Yes.

5 Q Miss Dunne, is that your verdict?

6 A Yes.

7 Q Miss Gusman, is that your verdict?

8 A Yes.

9 THE COURT:

10 That is twelve. The Court will remand Mr.
11 Sawyer to the Parish Prison and I will schedule
12 sentencing later.

13 (Recess for the day at 5:20 p.m.)

gram.²

We are unable to find, as suggested by the plaintiffs-appellants, anything in these documents that goes beyond routine or typical banking practices to support an allegation of knowing substantial assistance. *Woodward*, 522 F.2d at 97; *see also Woods*, 785 F.2d at 1012; *Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 646 (1972). As previously noted, the routine extension of a loan does not amount to substantial assistance. *See Seattle-First Nat'l Bank v. Carlsedti*, 678 F.Supp. 1543, 1549 (W.D.Okla.1987) (citing cases). Similarly, routine solicitation of a loan and obtaining financial and credit information for a loan is not substantial assistance. This summary judgment evidence will not support an inference that Landmark sought to cloak the principal defendants in an aura of respectability or reliability and thereby rendered knowing substantial assistance to the principals. *See Grimes, Hooper & Messer, Inc. v. Pierce*, 519 F.2d 1089 (9th Cir.1975); *see also Admiralty Fund v. City Nat'l Bank*, 677 F.2d 1315, 1316 (9th Cir.1982). The district court, therefore, properly concluded that Landmark was entitled to summary judgment.

III.

[3] In its cross appeal for Rule 11 sanctions, Landmark appeals only the denial of sanctions against the unrelated plaintiffs, i.e., those plaintiffs who purchased interests from the principal defendants in drilling partnerships other than the Walker 1-5 Program and with whom Landmark had no relationship. Landmark argues that before the unrelated plaintiffs were nonsuited, Landmark was required to engage in extensive discovery and hearings that could have been avoided if plaintiffs-appellees had made the minimal inquiry needed to show that they had no case against Landmark. Our review of the district court's denial of

2. The principals also included in the investor packets a document presenting various assumptions on how long it would take to repay the loan from income generated by the investment,

Rule 11 sanctions is controlled by our recent en banc decision in *Thomas v. Capital Security Servs., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc), in which we reaffirmed the district court's discretionary powers under Rule 11 and limited our review to an abuse of discretion. Although it is a close question, we cannot say the district court abused its discretion in denying sanctions. We are persuaded that the district court was justified in concluding that the unrelated plaintiffs could legitimately allege that they purchased partnership interests in part because they learned that Landmark was vouching for the credibility of the principals in one of their drilling programs. The district court did not abuse its discretion in determining that, for Rule 11 purposes, this alleged knowledge was enough to support the allegations that Landmark aided and abetted the principals in connection with the unrelated plaintiffs' transaction.

AFFIRMED.



Robert SAWYER, Petitioner-Appellant,

v.

Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

No. 87-3274.

United States Court of Appeals,
Fifth Circuit.

June 30, 1988.

Order Granting Rehearing En Banc
Aug. 25, 1988.

Petitioner appealed denial by the United States District Court for the Eastern District of Louisiana, at New Orleans, Hen-

assuming differing amounts of production from the wells. The summary judgment evidence revealed that this instrument was included without Landmark's knowledge.

ry A. Mentz, Jr., J., his petition for writ of habeas corpus. The Court of Appeals, King, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel; (2) error in violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience was harmless; and, the Court Per Curiam, held that: (3) remarks by prosecutor in closing argument at punishment stage of capital trial did not mislead jury by inducing it to feel less responsible than it should for sentencing decision.

Affirmed.

King, Circuit Judge, filed opinion dissenting in part.

1. Criminal Law §1208.1(5)

Invalid statutory aggravating circumstance did not constitutionally impair death sentence under Louisiana procedure, where jury properly found two other aggravating circumstances.

2. Criminal Law §641.13(1)

Test for ineffective assistance of counsel requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by Sixth Amendment, and showing that deficient performance so prejudiced defense that defendant was deprived of fair and reliable trial. U.S.C.A. Const.Amend. 6.

3. Criminal Law §641.13(1)

In order to make showing that counsel's performance was constitutionally deficient, defendant must demonstrate that counsel's representation fell below objective standard of reasonableness as measured by prevailing professional standards. U.S.C.A. Const.Amend. 6.

4. Criminal Law §641.13(1)

In evaluating whether counsel's alleged error has prejudiced defense, it is not enough for defendant to show that errors had some conceivable effect on outcome of the proceeding; rather, defendant must demonstrate reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

5. Criminal Law §641.13(4), 1163(2)

Failure of defense counsel to meet Louisiana requirement of five years' experience for appointed counsel in capital case was not presumptively prejudicial, since no actual or constructive denial of assistance of counsel resulted. LSA-Cr.P. art. 512; U.S.C.A. Const.Amend. 6.

6. Criminal Law §641.13(2)

Defendant was not prejudiced by counsel's failure to question prospective jurors about their views on death penalty, where state questioned prospective jurors on this point. U.S.C.A. Const.Amend. 6.

7. Criminal Law §641.13(2)

Defendant was not prejudiced by defense counsel's failure to rehabilitate veniremen who were excused because of their views contrary to death penalty, absent demonstration that rehabilitation was possible. U.S.C.A. Const.Amend. 6.

8. Criminal Law §641.13(2)

Defendant was not prejudiced by defense counsel's objection to jury's learning of mandatory life imprisonment penalty for second-degree murder, as well as penalty for manslaughter at guilt phase, absent showing of reasonable probability that jury decision would have been different had counsel not objected to jury's learning of lesser penalties, in view of the more than ample evidence to support jury's determination that defendant was guilty of first-degree murder. U.S.C.A. Const.Amend. 6.

9. Criminal Law §641.13(6)

Defense counsel was not ineffective in failing to secure his own expert witnesses to support defendant's intoxication and toxic psychosis defenses, absent suggestion that an examination would produce type of results sought or demonstration of sufficient evidence that defendant suffered from toxic psychosis. U.S.C.A. Const.Amend. 6.

10. Criminal Law §641.13(2)

Defense counsel's waiver of closing argument, believing the evidence against defendant to be overwhelming, was not prejudicial, absent showing of what counsel

might have said at closing that would have had reasonable probability of changing the result. U.S.C.A. Const.Amend. 6.

11. Criminal Law §641.13(7)

Defendant failed to specify what other mitigating evidence was available or how that evidence could have affected jury's decision, as required to support contention that defense counsel failed to prepare competent penalty phase presentation in capital case. U.S.C.A. Const.Amend. 6.

12. Criminal Law §641.13(2)

While defense counsel's closing was cursory and perfunctory, no prejudice was affirmatively demonstrated, as required to establish ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Criminal Law §1166.11(5)

Equal protection claim based on violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience was subject to harmless error analysis. LSA-Cr.P. art. 512; U.S.C.A. Const.Amend. 14.

14. Criminal Law §1165(1)

Error is harmless where, after reviewing facts of case, evidence adduced at trial and impact constitutional violations had on trial process, evidence remains not only sufficient to support verdict but so overwhelming as to establish guilt of accused beyond reasonable doubt.

15. Criminal Law §1166.11(5)

Given overwhelming evidence of guilt, claim of equal protection error in failure to comply with state statute requiring that appointed counsel in capital case have five years' experience was harmless. LSA-Cr.P. art. 512; U.S.C.A. Const.Amend. 14.

16. Habeas Corpus §45.2(4)

Proper inquiry in habeas proceeding where there has been violation of state procedure is to determine whether there has been constitutional infraction of defendant's due process rights which would render trial as a whole fundamentally unfair. U.S.C.A. Const.Amend. 14.

17. Constitutional Law §268.1(6)

Criminal Law §641.13(4)

There was no due process claim based on violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience, absent any demonstration of prejudice. U.S.C.A. Const.Amend. 14.

18. Criminal Law §713

Prosecutor's reference, at punishment stage of capital trial, to jury's verdict as a "recommendation" and as "only the initial step" was improper.

19. Constitutional Law §268(6)

Criminal Law §723(1)

Remarks by prosecutor in closing argument at punishment stage of capital trial did not deny defendant due process by inducing jury to feel less responsible than it should for sentencing decision, where jury was told that life-or-death decision was up to them and that execution could not be exacted without their permission. U.S.C.A. Const.Amend. 14.

Catherine Hancock, Elizabeth W. Cole, New Orleans, La., for petitioner-appellant.

John J. Molaison, Jr., Dorothy Pendergast, Asst. Dist. Atty., Gretna, La., for respondent-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, KING and DAVIS,
Circuit Judges.

KING, Circuit Judge:

Robert Sawyer appeals from the district court's denial of his petition for writ of habeas corpus, and its concomitant entry of an order rescinding Sawyer's stay of execution. On appeal, Sawyer argues that his conviction for first degree murder should be reversed both because he was denied effective assistance of counsel and because the state trial court, by failing to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar for at least five years, violated Sawyer's constitutional due pro-

cess and equal protection rights. In addition, Sawyer argues that the prosecutor's closing argument in the sentencing phase of his trial violated the eighth amendment by erroneously misleading the jurors concerning their role as the final arbiters of death. As we agree with the district court that Sawyer's challenges to his conviction and sentence do not warrant habeas relief, we affirm the district court's judgment.

1. The district court adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana in Sawyer's case:

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

848 F.2d—15

1.

Robert Sawyer ("Sawyer") is a state prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Sawyer and Charles Lane ("Lane") were charged with first degree murder for the gruesome slaying of Frances Arwood.¹ Both were ultimately tried separately. Sawyer was represented at trial by his

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-98.

court-appointed attorney, James Weidner ("Weidner"). Sawyer was originally represented by Wiley Beevers ("Beevers"). It was Beevers who had initially brought Weidner into the case by asking him to assist as co-counsel. Beevers subsequently withdrew from the case when Sawyer refused to accept a plea bargain offered by the prosecutor and Weidner was left as sole counsel. Upon receiving his appointment, Weidner informed the trial court that he was not a "death-qualified" attorney because he lacked five years experience as required for appointed counsel in capital cases by article 512 of the Louisiana Code of Criminal Procedure.² The trial court told Weidner to get an experienced counsel to "sit" with him. Weidner managed to secure some assistance from several other attorneys, but no "death-qualified" attorney was ever appointed as co-counsel. Neither party disputes the fact that the terms of article 512 were not complied with. Sawyer was convicted of first degree murder and sentenced to death by a jury on September 19, 1980.

His conviction and sentence were affirmed by the Louisiana Supreme Court. See *State v. Sawyer*, 422 So.2d 96 (La. 1982). Sawyer's petition for a writ of certiorari to the United States Supreme Court was granted and the case was remanded with instructions for the Louisiana Supreme Court to reconsider its ruling in light of *Zant v. Stephens*, 462 U.S. 862, 108 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See *Sawyer v. Louisiana*, 463 U.S. 1223, 108 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the death sentence, see *Sawyer v. Louisiana*, 442 So.2d 1186 (La. 1983), and Sawyer's subsequent petition for writ of certiorari was denied, see *Sawyer v. Louisiana*, 466 U.S. 981, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). At this point, Sawyer sought state habeas relief which was ultimately unsuccessful. See *Sawyer v. Mag-*

gio, 479 So.2d 380 (La.1985); *Sawyer v. Maggio*, 480 So.2d 313 (La.1985).

Having exhausted his state remedies, Sawyer filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. In his petition, Sawyer argued, among other things, that he received ineffective assistance of counsel, and that the state trial court's failure to comply with article 512 violated his due process and equal protection rights. Moreover, Sawyer claimed that the prosecutor's closing argument in the sentencing phase of his trial erroneously misled the jury as to their role as the final arbiters of death and, therefore, violated the eighth amendment. After granting Sawyer a stay of execution, the district court assigned Sawyer's case to a magistrate for a hearing. On September 9, 1986, the magistrate submitted his proposed findings and recommended to the district court that Sawyer's petition be denied and the stay of execution be vacated. With respect to Sawyer's ineffective assistance of counsel claim, the magistrate concluded that Sawyer had failed to demonstrate that he was prejudiced by any of Weidner's allegedly deficient actions as counsel. As to the state trial court's non-compliance with article 512, the magistrate began by noting that the state trial judge, after the evidentiary hearing, concluded that the violation is not fatal to a capital conviction when the defendant actually received effective assistance of counsel. The magistrate, therefore, refused to reach the issue of whether Sawyer's due process and equal protection rights were actually violated "since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (1967)." Finally, the magistrate concluded that the prosecutor's remarks in his closing argument during the penalty phase were

pleads to the indictment. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

2. Article 512 provides, in pertinent part:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall assign counsel for his defense. Such counsel may be assigned earlier, but must be assigned before the defendant

distinguishable from those condemned in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as violative of the eighth amendment. Moreover, after concluding that "[r]eference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty," the magistrate went on to conclude that since "there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different," resentencing would be inappropriate.

On April 8, 1987, the district court issued its ruling adopting the magistrate's findings and recommendations in an order incorporating several amendments to the magistrate's opinion.³ The district court also examined, in greater detail, the question of whether Chapman's harmless error analysis applies to the alleged constitutional violations in the instant case. The district court concluded that a Chapman analysis was appropriate since the state trial court's failure to appoint counsel with five years experience could not be classified as a violation of constitutional rights "so basic to a fair trial" as to preclude the harmless error inquiry. The district court found no merit in Sawyer's assertion that harmless error analysis can never be applied to due process or equal protection errors. Finally, the district court found that the state trial court's appointment of counsel with less than five years experience in the instant case was indeed harmless since the evidence against Sawyer was

so overwhelming as to establish his guilt beyond a reasonable doubt. Sawyer filed timely notice of appeal and was granted a certificate of probable cause to appeal and a stay of execution pending appeal. We have jurisdiction under Title 28, United States Code, section 2253.

II.

[1] On appeal, Sawyer raises three challenges to his confinement and sentence. First, Sawyer argues that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was not lawfully qualified to represent a capital defendant," in violation of the sixth amendment. Next, Sawyer argues that the state trial court's failure to comply with article 512 violated Sawyer's constitutional due process and equal protection rights. He contends that the district court erred in applying a harmless error analysis to his claims for they are related to the integrity of the trial process itself and, as such, are not proper subjects for a Chapman inquiry. Finally, Sawyer contends that certain improper remarks by the prosecutor in closing arguments at the sentencing phase of Sawyer's trial erroneously misled the jury as to their role in the death penalty determination and, therefore, violated the eighth amendment as interpreted in *Caldwell*. Sawyer also takes issue with the district court's imposition of a prejudice requirement on his *Caldwell* violation claims. We will consider each of these arguments in turn.⁴

previously been convicted of an unrelated murder. Sawyer, 422 So.2d at 101. The Louisiana Supreme Court concluded that the evidence of Sawyer's prior conviction was properly admitted, however, and did not inject an arbitrary factor into the sentencing proceeding. *Id.* at 104. Sawyer's argument to the contrary is of no moment. As we have stated:

The fact that an invalid statutory aggravating circumstance has been found does not constitutionally impair a death sentence under the Louisiana procedure where the jury has also found another aggravating circumstance which is supported by the evidence and is valid under the law and of itself suffices to authorize the imposition of the death penalty. *James v. Butler*, 827 F.2d 1006, 1013 (5th Cir. 1987); see also *Byrne v. Butler*, 845 F.2d 501, 501, 514-15 (5th Cir.1988).

3. For the balance of this opinion, we will refer to the magistrate's findings and recommendations, as corrected by the district court, and the district court's additions to the magistrate's report collectively as the district court's conclusions.

4. Sawyer also argues briefly that since the jury was allowed to weigh an aggravating circumstance that was later held to have been improperly submitted, his death sentence was imposed in violation of the eighth amendment. Specifically, the jury found that Sawyer had previously been convicted of an unrelated murder because he was indicted in Arkansas for second degree murder in the killing of a child, and pled guilty to involuntary manslaughter for that crime. The Louisiana Supreme Court, however, ruled that a conviction for involuntary manslaughter could not support a finding that Sawyer had

III.

A. Ineffective Assistance of Counsel

Sawyer points to a number of alleged deficiencies in Weidner's performance at trial as support for his allegation of ineffective assistance of counsel. Specifically, Sawyer notes that Weidner: (1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to negate the specific intent required for first degree murder; (5) failed to make a closing argument at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

[2,3] Sawyer's claims of ineffective assistance of counsel must be evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2062, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2084). The burden that *Strickland* imposes on a defendant is severe. *Proctor v. Butler*, 831 F.2d 1251, 1255 (5th Cir.1987). In order to satisfy the deficiency prong of the *Strickland* test, for example, the defendant must demonstrate

Sawyer does not dispute that the jury properly found two other aggravating circumstances, namely that the crime was committed in a particularly heinous manner and that it occurred during the perpetration of arson. The Louisiana Supreme Court concluded that the evidence was clearly sufficient to support the jury's findings with respect to those aggravating circumstances. Sawyer, 422 So.2d at 101, and "[t]hat court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d

that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable. We have stressed that, "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.'" *Martin*, 796 F.2d at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987)).

[4,5] In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czeres v. Butler*, 833 F.2d 59, 64 (5th Cir.1987). On the contrary, *Strickland* requires that the defendant affirmatively prove prejudice. *Id.* *Strickland* also authorizes us to proceed directly to the question of prejudice. Therefore, if Sawyer fails to demonstrate prejudice, the alleged deficiencies in Weid-

854, 855 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987). In fact, Sawyer does not argue that the evidence was insufficient to support the other aggravating circumstances. Those aggravating circumstances were sufficient to authorize the imposition of the death penalty and Sawyer has not challenged their legal validity in this case. Sawyer's sentence, therefore, was not constitutionally impaired by the submission of the invalid aggravating circumstance. See *Byrne*, at 515.

ner's performance need not even be considered. See *Strickland*, 466 U.S. at 698-99, 104 S.Ct. at 2070; *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir.1984). Since both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact, we must make an independent determination of whether the representation accorded Sawyer by counsel passed constitutional muster. *Ricalday v. Proctor*, 736 F.2d 203, 206 (5th Cir.1984); *Truss v. Maggio*, 731 F.2d 288, 292 (5th Cir.1984). With these considerations in mind, we now turn to the merits of Sawyer's contentions.⁵

[6,7] With respect to Sawyer's objections to voir dire, we need not decide whether counsel's failure to question prospective jurors about their views on the death penalty was professionally unreasonable because Sawyer has failed to demonstrate prejudice. Sawyer does not dispute the fact that the State questioned the prospective jurors on this point. Rather, Sawyer asserts that because "the actual value of the rights [counsel] so casually sacrificed cannot be measured in concrete terms," *Strickland* would excuse his failure to affirmatively demonstrate—or concretely allege—prejudice from counsel's actions. Sawyer's novel interpretation of *Strickland* is unsupported by authority and runs counter to our interpretation of that case. Sawyer also alludes to the prejudice which resulted from counsel's failure

to rehabilitate veniremen who were excused because of their views contrary to the death penalty. Sawyer fails, however, to demonstrate that rehabilitation was possible. Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of. We find no merit in Sawyer's allegations that counsel's voir dire performance constituted ineffective representation of counsel.

[8] At trial, Weidner objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase. Sawyer asserts that he was prejudiced by this objection because "[w]ithout this information, the jury would never realize that a conviction for second degree murder carried a mandatory life sentence, so that a vote against first degree would both remove the possibility of a death sentence and also insure permanent incarceration." By objecting to the jury's receipt of this information, Sawyer argues, Weidner deprived his client of any realistic opportunity for a second degree murder conviction and a chance of avoiding the penalty phase of trial. The district court, however, concluded that Sawyer's argument was without merit since "it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder," and because Sawyer's "contention that the jury might have returned a verdict of manslaughter, had it

5. In addition to his specific allegations of Weidner's ineffectiveness, Sawyer also contends that Weidner's failure to meet article 512's standards for death qualification rendered his assistance as counsel unreasonable *per se* under "prevailing professional norms." See *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. Sawyer asserts that "prejudice from this form of inadequate representation may be presumed." We need not address the first contention for we do not agree with Sawyer that counsel's failure to meet the state law standard was presumptively prejudicial. In support of this proposition, Sawyer relies on language from *Strickland* to the effect that prejudice may be presumed: (1) where "prejudice . . . is so likely that case by case inquiry is not worth the cost," and (2) where the impairment of the sixth amendment right is "easy to identify and, for that reason . . . easy for the government to prevent." See *id.* at 692, 104 S.Ct. at 2067. Sawyer's reading of *Strick-*

land as establishing a generally applicable two-pronged test for presumptive prejudice is clearly in error. The Court in *Strickland* included the aforementioned language merely to illustrate why it presumes prejudice where there has been an actual or constructive denial of the assistance of counsel altogether, or where the state has prevented counsel from assisting the accused during a critical stage of the proceedings. See *id.* (citing *United States v. Cronic*, 466 U.S. 648, 657 & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657 (1984)). The state trial court's failure to comply with article 512 did not result in an actual or constructive denial of the assistance of counsel. Therefore, we are unwilling to extend *Strickland*'s limited relaxation of the prejudice requirement to the facts of this case. Sawyer's claims are subject to the general requirement that the defendant affirmatively prove prejudice.

known he could have received twenty years imprisonment, has even less support in light of the evidence."

Once again, Sawyer has failed to affirmatively demonstrate prejudice. He has not shown a reasonable probability that, absent Weidner's objection to the jury's learning of lesser penalties, the jury decision would have been different. We note first that the evidence adduced at trial was more than ample to support the jury's determination that Sawyer was guilty of first degree murder.⁶ Moreover, Sawyer fails to demonstrate a reasonable probability that the jury would have returned a verdict of guilty to either of the lesser offenses. Finally, as for avoiding the penalty phase of trial in hopes of securing a term of life imprisonment, Sawyer had consistently refused to accept such an offer by way of a plea bargain.⁷

6. As the district court noted, "[Sawyer] did not seriously contest at trial his involvement in the beating and burning of the victim." In any event, the testimony of Cynthia Shano, an eyewitness to the incident, as well as the other testimony and physical evidence introduced at trial, provided a sufficient factual underpinning for the jury's verdict. The Louisiana Supreme Court found that: (1) "[t]here was . . . ample evidence from which a rational juror could have concluded beyond a reasonable doubt that [Sawyer] was engaged in the perpetration of aggravated arson;" (2) Sawyer's actions evinced the specific intent to inflict great bodily harm; and (3) the evidence was "plainly sufficient" to support the conviction. *State v. Sawyer*, 422 So.2d at 99. "That court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987).

Sawyer's chief defense at trial was that he lacked the specific intent to commit first degree murder due to intoxication. In reviewing this claim, the Louisiana Supreme Court concluded that "the jury reasonably rejected the defense." *State v. Sawyer*, 422 So.2d at 99. The Louisiana Supreme Court went on to hold that "[t]here was ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found that [Sawyer] acted with specific intent, despite his excessive consumption of alcohol." *Id.* Our review of the record shows this conclusion well supported by the evidence. Sawyer has failed to demonstrate otherwise.

7. Sawyer's assertions of prejudice are further belied by Weidner's testimony at the state habe-

Next, Sawyer contends—however perfunctorily—that Weidner's failure "to object to inadmissible, inflammatory statements by the prosecutor" constituted an example of Weidner's prejudicial representation. Sawyer complains of Weidner's failure to object "to the prosecutor's use of facts not in evidence during voir dire, which facts were never established at trial." Specifically, Sawyer complains of references to the use of a hammer in the commission of the crime. The district court concluded that the prosecutor's reference to the hammer, when "viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict." Moreover, at trial, Weidner objected to the testimony of a state witness who alluded to the use of a hammer during the attack, and requested a mistrial. The trial court denied the request but instruct-

as hearing. At the hearing, Weidner gave the following explanation for his actions:

A. . . . My reasoning was that I didn't want the jurors to know the penalty for manslaughter was, you know, was twenty-one years. I didn't want them to know that. And that was basically a concession to Robert Sawyer. He was—Robert was insisting that we argue for manslaughter. And in light of the facts of the case, you know, and I explained to Robert I had, you know, "You're asking me to blow whatever credibility I may be able to build with the jury by doing that, especially if they find out that it's a twenty-one year sentence. You know, it's a relatively light sentence: they're going to figure out real quick that you, you know, with the other things, that you could be out of jail relatively soon if they find you guilty of manslaughter."

So, kind of as a compromise between Robert, you know, I agreed we won't let them know what any of the penalties are. Let's try to set it up so that the jury knows that it's death or something else.

Q. So, Mr. Sawyer's anticipation in that area consisted of his instructing you to argue for manslaughter, and not for second degree murder?

A. Robert had consistently—he had been informed as late as the morning we began the trial that he could plead guilty to first degree murder without the death penalty. And he consistently refused and said "You tell them I will plead guilty to manslaughter and nothing else."

ed the jury that "until now there has been no testimony regarding any hammer by any other prior witness so I am going to ask you to disregard those comments and that statement by the witness and don't let that statement prejudice Mr. Sawyer in any way." Sawyer's assertion, therefore, is without merit.

[9] Sawyer's next objection to Weidner's performance concerns counsel's use of expert testimony to support Sawyer's intoxication and toxic psychosis defenses. Sawyer complains that Weidner failed to secure his own expert witnesses and instead relied on "state" experts—psychiatrists who had been appointed to a pre-trial lunacy commission charged with determin-

ing whether Sawyer was competent to stand trial—who gave damaging testimony. Each of the psychiatrists in question examined Sawyer for approximately half an hour in connection with the competency proceeding and concluded that Sawyer understood the nature of the charges against him and could assist his attorney in his defense. Weidner was successful in eliciting testimony from them which supported the toxic psychosis defense.⁸ In his habeas petition, Sawyer complains that these opinions were based upon a set of hypothetical questions only, and that Weidner should have procured an expert who could have testified as to the actual effect of alcohol on Sawyer. As the district court noted, "[Sawyer] does not suggest that type of

8. The following excerpts from the testimony at trial are instructive:

Q. [By Weidner to Doctor Albert DeVilliere] Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening, Robert Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.

A. What time?

Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continued to drink MD 20/20 wine at that time. At some time during the next five to six hours some very heinous acts occurred. At approximately 1:30 in the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.

With the facts given to you from that hypothesis, Doctor, can you render an opinion as to the condition you believe Robert Sawyer was in during the time.

A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.

Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?

A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways.

Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?

A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.

Q. [By Weidner to Doctor Genevieve Arneson] Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is as described by witnesses—

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

examination would produce the type of results he seeks or that those results would even be obtainable." In addition, Doctor Albert DeVilliers, one of the two experts, testified both at trial and during the sanity hearing that a physician would have to have been at the scene of the crime during its commission to be in a position to render an opinion on Sawyer's intent or the effect of toxic psychosis on that intent at the time of the crime. Finally, as the district court concluded, Sawyer has failed to demonstrate sufficient evidence that he suffered from toxic psychosis to support his claims. His assertions on this point, therefore, are without merit.

Sawyer also points to Weidner's waiver of closing argument at the guilt phase of trial. Sawyer asserts that "[a] failure to give a closing argument constitutes a clear breakdown in the adversary process under [Strickland] as the jury must infer that the defense counsel who waives argument has abandoned his client's case, and has nothing to say because he believes him to be guilty." Weidner testified during the state evidentiary hearing that his deliberate decision to dispense with closing argument was based on two separate considerations. First, having dealt with the prosecutor in other trials, Weidner knew that the prosecutor tended towards "mild" closing arguments and "saved all of his big guns" for rebuttal. Therefore, "all [Weidner] could see closing argument was going to do in the guilt phase of the trial was give [the prosecutor] a chance to come back behind [him], show them the picture again ... and just make it worse." Second, Weidner realized the strong case the state had against Sawyer as to his guilt and felt that the best hope for salvaging anything for Sawyer was in the penalty phase, where Weidner hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk his credibility with the jury by advancing arguments that the jury might perceive as unsupportable.

[10] The district court concluded that "[w]hile an attorney's decision to waive closing argument might ordinarily deprive

a defendant of the effective assistance of counsel, we do not find that to be the result in the case before us." We agree that the waiver of closing argument was not prejudicial on the facts before us. Weidner believed the evidence against Sawyer to be "overwhelming." That view seems to have been shared by all of the attorneys familiar with the case. Beavers, for example, was "convinced that there was overwhelming weight of evidence" against Sawyer and "[he] was concerned ... about the high probability of a death penalty should [Sawyer] proceed to trial." Samuel Dalton, an attorney who testified for Sawyer at the state habeas evidentiary hearing, also recalled "that the evidence of the homicide was overwhelming." Moreover, we note that closing argument was not needed to organize and explain the defense position. The district court concluded that "[u]nder the circumstances, the jury could not help but to have understood the nature of Sawyer's defense." After a thorough review of the record, we find no error in the district court's conclusion that the jury was fairly apprised of the nature of Sawyer's defense during voir dire and Weidner's opening statement, and that the testimony of defense witnesses as to aspects of the defense theory was simple and direct.

Sawyer's assertions of prejudice are unsupported by the record. He has failed to demonstrate what counsel might have said at closing that would have a reasonable probability of changing the result of the trial and therefore, in light of Weidner's tactical considerations and the strong evidence against Sawyer, we are unprepared to find that the waiver of closing argument here was prejudicial.

[11] Finally, Sawyer contends that Weidner failed to prepare a competent penalty phase presentation. Specifically, Sawyer points to Weidner's alleged failure to conduct sufficient investigation and uncover relevant mitigating evidence. Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. For example, Sawyer complains that Weidner could have called other family

witnesses who would have been available to testify about mitigating circumstances. Yet, Sawyer neither describes the substance of that potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law. He also complains that Weidner did not spend enough time preparing the witnesses to testify. It is clear, however, that brevity of consultation is insufficient to warrant habeas relief. *Schwander*, 750 F.2d at 499.

[12] Sawyer also points to Weidner's closing argument as an example of attorney incompetence. In that closing, Weidner reiterated several dominant themes of his case: (1) that the jury bears a great responsibility and that they should be lenient by not "killing" Sawyer; (2) that the death penalty is improper under any circumstances; and (3) that Sawyer lived through a difficult childhood, had been in a mental hospital and had been drunk during the commission of the offense. While Weidner's closing was, as the district court noted, cursory and perfunctory, Sawyer has failed to affirmatively demonstrate prejudice. The closing was adequate to inform the jury of the defense's position. In addition, Sawyer has not articulated how Weidner's closing affected the jury's decision or could have been improved. Weidner's penalty phase presentation was imperfect but Sawyer has failed to demonstrate that it was constitutionally improper under *Strickland*.

For the foregoing reasons, we conclude that since Sawyer has failed to affirmatively demonstrate prejudice from any of Weidner's allegedly deficient actions as counsel, Sawyer's ineffective assistance claim must fail.

B. Equal Protection and Due Process

Sawyer claims that the state trial court's refusal to comply with the terms of article

9. As the Court stressed in *Van Arsdall*: The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process

512 violated his rights to equal protection. We need not, and most certainly do not, reach the question of whether this violation of state law actually rose to the level of an equal protection violation. Even if Sawyer could prove an equal protection violation, that violation would still be subject to a harmless error analysis and, under such an analysis, would clearly fail.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the notion that errors of constitutional dimension necessarily require reversal of criminal convictions. *Id.* at 21-22, 87 S.Ct. at 826. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); see also *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Despite the strong interests that support the harmless error doctrine,¹⁸ however, the Court has recognized that some constitutional errors require reversal without regard to the evidence in the particular case. *Rose*, 106 S.Ct. at 3106. This limitation recognizes "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-828 (emphasis added).

[13] The Court in *Rose* sought to clarify this notion:

The State of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or inno-

by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

cence, and no criminal punishment may be regarded as fundamentally fair. *Rose*, 106 S.Ct. at 3106 (citations omitted). Harmless error analysis, therefore, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (citing *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436). As the Court stated in *Rose*, "[e]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, or denied it altogether." *Rose*, 106 S.Ct. at 3106 n. 6. Therefore, "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Sawyer has failed to overcome that presumption.

We agree with the district court that a state law right to "death-qualified" counsel of five years experience is not included in *Chapman*'s "basic to a fair trial" category. Sawyer concedes that the right to a five year attorney is not itself a federal constitutional right. He argues, however, that "the state's arbitrary abrogation of that right may give rise to an equal protection ... violation." This federal constitutional right, the argument continues, is basic to a fair trial under *Chapman* "in the context of a breakdown in the state-guaranteed trial machinery in a capital case." We do not agree. The alleged constitutional violation in the instant case neither aborted the basic trial process nor denied it altogether, for Sawyer received the effective assistance of counsel.¹⁹ "The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct

18. The Court in *Rose* placed a great deal of emphasis on the error's potential effect on the factfinding process at trial. *Rose*, 106 S.Ct. at 3106. Specifically, the Court emphasized the deleterious effect which errors such as judicial bias or denial of counsel might have on the composition of the record. *Id.* at 3107 n. 7. Where the error in question does not affect the record, "[e]valuation of whether the error preju-

judgments." *Id.* at 3107. Recognizing that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, we conclude that the state trial court's failure to comply with article 512 does not compare with the kind of errors that have been found to automatically require reversal of an otherwise valid conviction. Sawyer's equal protection claim, therefore, was properly subjected to a harmless error analysis by the district court.

[14,15] Having determined that a harmless error analysis is appropriate in this case, we must turn to the question of whether the state trial court's appointment of counsel with less than five years experience was indeed harmless. An error is harmless where, after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96 (1983); *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. March 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.), cert. denied, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980). Given the overwhelming evidence of guilt presented at Sawyer's trial, we agree with the district court that the state trial court's error was harmless beyond a reasonable doubt. Sawyer's equal protection claim, therefore, must fail.

[16,17] Sawyer's due process claim is also meritless. Where there has been a violation of state procedure, the proper inquiry "is to determine whether there has

diced respondent ... does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence." No such difficult inquiries are required in the instant case. The failure to appoint five year counsel did not affect the composition of the record in such a way as to prevent an appellate court from evaluating the potential harm to Sawyer.

been a constitutional infraction of the defendant's due process rights which would render the trial as a whole 'fundamentally unfair.'" *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711-12 (5th Cir.1986) (quoting *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A April 1981)). In order to show that his trial was fundamentally unfair, Sawyer must demonstrate that some prejudice resulted from the state trial court's failure to appoint counsel with five years experience. See *Manning*, 786 F.2d at 712. As we explained earlier, Sawyer has failed to demonstrate prejudice and, therefore, his claim must fail.¹¹

C. Caldwell Violation ¹¹

Finally, Sawyer maintains that certain remarks by the prosecutor in closing argument at the punishment stage of his trial violate the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and require that his sentencing process be redone.

Caldwell is a rule of narrow application. It applies only to comments that mislead a jury in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision. *Darden v. Wainwright*, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15. The rule is well illustrated by the case in which it was laid down.

In *Caldwell*, the defendant had murdered the female proprietor of a small, rural bait and grocery store in the course of a robbery. Defense counsel, unable to find much comfort in relevant fact or law, took refuge in rhetoric, dwelling at some length on the Sixth Commandment, the

Savior, the Crucifixion, mercy, forgiveness and certain of the less desirable aspects of being electrocuted. In response, the prosecuting attorney attacked the defense for cynically heaping undue responsibility upon the jury, while the judge concurred—overruling an objection to the argument and directing its continuance:

ASSISTANT DISTRICT ATTORNEY: Ladies and Gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet the ...

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, go on and make the full expression so the jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna

fundamentally unfair, it would seem that the violation could never be harmless. Because we find no due process violation in the case at bar, however, we see no need to reconcile the conceptual difficulties, or to determine whether harmless error analysis can ever be appropriately applied to a due process claim.

12. The remainder of the opinion and the result represent the views of the panel majority, Judges Gee and Davis. The views of Judge King are set forth in her appended dissent.

11. In the instant case, the district court applied a harmless error analysis to Sawyer's due process claims and found that any alleged violation was in fact harmless. We have found that there was no due process violation, since Sawyer's trial was not rendered fundamentally unfair by the state trial court's failure to appoint death-qualified counsel. Therefore we need not decide whether the district court's analysis was appropriate. We note that there are certain conceptual difficulties inherent in applying a *Chapman* analysis to a due process claim for, if the violation of state law rendered the trial

take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.

Caldwell, 472 U.S. at 325-26, 105 S.Ct. at 2637-38 (emphasis added).

The Supreme Court, speaking through Justice Marshall—whose consistent view has long been that capital punishment is forbidden by the Constitution in any case whatever—declared this capital sentence unenforceable because it was imposed by a jury that had been misled by the judge and prosecutor about its critical and central role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

A considerable extension of *Caldwell* would be required to accommodate Sawyer's contentions. In our view, a most critical factor in *Caldwell* was the trial judge's approval and encouragement of the prosecutor's tendentious response to defense counsel's spread-eagled oratory.¹² As our Brethren of the Eleventh Circuit have observed:

Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus ... mandating reversal.

Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), cert. denied, — U.S. —, 107 S.Ct. 1369, 94 L.Ed.2d 529 (1987).

The Supreme Court took a similar view of the passage, observing that the judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of

13. No criticism is implied; counsel had few, if any, other courses open to him and did what he

the jury's role was correct." *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. The comparable proceedings here, while falling short of perfection as do most actual trials, are a far cry from those in *Caldwell*. The respect in which they approach it most closely is in the remarks of the prosecutor; in all other respects of significance, they resemble if not at all. We do not condone the remarks in question and we shall discuss them in a moment. Before doing so, however, we think it appropriate to attempt to put the rule of *Caldwell* into a broader context and to sketch out a general approach for dealing with alleged breaches of it.

A general survey of the authorities indicates, as common sense supports, that the *Caldwell* problem results from prosecutorial attempts to counter a particular set of last-resort arguments by the defense in capital cases. Given that in most such cases verdicts must be unanimous, it necessarily follows that, when all else seems lost, counsel may seek to persuade at least one juror (if no more) that: he or she is being asked to "kill" the defendant, that killing is always wrong, that even evidence that seems absolutely conclusive is sometimes not, that at its best human judgment is fallible, that if the defendant is erroneously executed no correction of the error is possible, and that at all events mercy is better than retribution. Taken together, these are formidable arguments, arguments that can be made in any case whatever, arguments all of which are in varying degrees true. One response which they sometimes evoke from the prosecutor is an exhortation to the jury to view its responsibility as a joint, rather than an individual, one; and several varieties of that response were made in this case, two permissible, one dubious.

The first called on the jury to view itself as the representative of the citizenry, as "we the people," declaring by its verdict that the acts of the defendant in torturing his victim to death were intolerable and

could for his client with his back to the wall.

should call down upon him the full force of the law. Another such argument appealed to their group spirit as jurors, assuring them that they did not stand alone in whatever they did but rather functioned together as an institution:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so.

So far, so good; fair argument.

[18] The next sentence, however, embarks upon a far different and more dubious sort of "joint responsibility" argument, one that vaguely and generally reassures the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong...." Who these "others" were, the jury was not told. In addition, at various points in the argument the prosecutor improperly referred to the jury's verdict as a "recommendation," and at another as "only the initial step." No objection was made by the defense at any of the foregoing points.

Following them, however, defense counsel advised the jury in his closing argument that:

The decision whether Robert Sawyer lives or dies is in your hands....

I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person.... I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

After the prosecutor's closing argument, in which he advised the jury that it really had no choice but to recommend the death penalty, "no matter how unpleasant or how difficult this type of decision may be for you to make," the judge charged the jury in standard form, directing them to the

evidence as the basis for their decision, describing their forthcoming verdict in one place as a recommendation of sentence and at the other as the imposition of one, and concluding:

It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or life imprisonment. Go with Mr. Miller back in the jury room.

So much for the circumstances of how the jury was advised. We turn now to the law.

[19] The vice in the argument against which *Caldwell*'s rule is directed is not so much that it minimizes the jury's role in the capital sentencing procedure as that it minimizes it untruthfully.¹⁴ It is all too likely that a lay juror who has been told that panel after panel of judges—right up through the Supreme Court—will automatically "review" his verdict may believe that they "review" it as he decided it, in a plenary fashion. Were he told that the "review" would not at all directly concern itself with the central issue before him, life or death for the accused, he would necessarily feel far less reassurance at the prospect. Where, however, a reading of the record makes clear that the jury was told that the life-or-death decision was up to them and that execution could not be exacted without their permission, we think that *Caldwell* is satisfied.

We think it plain that this was the case as to Sawyer. Both the prosecution and the defense, as well as the trial judge, advised Sawyer's jury that if it chose life imprisonment as its verdict, that was the end of the matter. The defense implored them to do so, and the prosecution—despite various ambiguous statements indicated above—told them it was up to them: "The decision is in your hands."

In the last analysis, the fundamental question, in this as in other habeas cases involving prosecutorial remarks complained of, is whether the petitioner has demonstrated that the remarks "so infected the

at 2646.

14. See Justice O'Connor, concurring partly and separately in *Caldwell*, 472 U.S. at 341, 105 S.Ct.

trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2472, 91 L.Ed.2d at 187 (quoting from *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In a *Caldwell* situation, however, we agree with our Brethren of the Eleventh Circuit that because the prosecutor's remarks typically amount to a misinstruction to the jury on the legal effect of their verdict, the reaction to them of defense counsel and trial judge are of especial importance:

Of critical importance in *Caldwell* was the fact that the trial judge approved of the prosecutor's comments, stating that it was proper that the jury be told that its decision was automatically reviewable. See *id.*; *Caldwell v. Mississippi*, 472 U.S. at 325-26, 106 S.Ct. at 2638. Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the Eighth Amendment's heightened requirement of reliability in a capital case and mandating reversal.¹⁵

¹⁵ The Court in *Caldwell* noted that in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the trial judge took special pains to correct the prosecutor's impropriety, giving the jury a strong curative instruction. In contrast, in *Caldwell*, the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell v. Mississippi*, 472 U.S. at 2645, 105 S.Ct. at 340.

Tucker, 802 F.2d at 1295.

Indeed, the only instance of reversal for a *Caldwell* violation in our Circuit to which we are cited or which our researches have located is *Wheat v. Thigpen*, 793 F.2d 621 (1986), in which the trial court approved the making of such an argument over defense counsel's objection:

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your

work, and see if you've made the right decision. And I can assure you, Lady and Gentlemen, that if one finds that you have not, that they will send him back and tell us to try it over, because someone made a mistake.

BY MR. STEGAL: May It Please T Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because it's wrong, they're gonna send it back. That's not right. I'm gonna object.

BY THE COURT: I think the argument was allowed—it was opened up on your argument. I'll overrule it.

793 F.2d at 628.

In so stating we do not, of course, intend to say that reversal is never appropriate the case of a *Caldwell*-type misstatement unless it has been futilely objected to or endorsed as proper or correct by the trial judge. Each case must be evaluated on its own facts and circumstances; and it is not impossible to imagine statements by a prosecutor that, even absent an objection, minimize the jury's role to such a degree as to require reversal if left uncorrected. Even in *Caldwell*, however, where the trial court had overruled an objection and in doing so expressly endorsed the prosecutor's minimizing remarks, the Supreme Court emphasized that his remarks were "quite focused, unambiguous, and strong." 472 U.S. at 340, 105 S.Ct. at 2645. And indeed they were: beginning with two accusations of duplicity on the part of the defense, the argument proceeds through an attack focused on the defense's "insinuating" that the jury's decision was final, invokes the trial judge's already-expressed approval of its somewhat misleading statements, and winds up by assuring the jurors that the decision is "automatically reviewable by the Supreme Court." By contrast, the prosecutor's vague references in today's case to "others who will be behind you and the like pale into relative insignificance."

The prosecutor in today's case indulges in no claim that the defense was disingenuous or cynically attempting to mislead the jury, as did his comparable figure in *Caldwell*. Nor did counsel raise any objection.

tion, futile or otherwise, to any of the prosecutor's remarks to which Sawyer now takes exception; and the trial court neither approved nor endorsed them. By contrast to the prosecutor's statements in *Caldwell*, which were quite focused, unambiguous and strong—trumpeting automatic review by the Supreme Court and accusing the defense of deliberately misleading the jury as to its role—these were vague and ambiguous. And although we agree with the federal district court that the prosecutor's remarks complained of were improper, we also agree that they did not constitute reversible error—error that so infected the trial as to deny due process.¹³

IV.

For the foregoing reasons, we AFFIRM.

KING, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that the prosecutor's undeniably improper remarks about the finality of the death penalty determination did not violate the eighth amendment as interpreted and applied by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). I have several major concerns with the majority's analysis. First, by applying the fundamental fairness test of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), instead of the "no effect" test of *Caldwell*, the majority has reviewed the prosecutor's comments in this case under the wrong standard. Second, by holding that "a most critical factor in *Caldwell* was the trial judge's approval" of the prosecutor's remarks, the majority has adopted an

artificially narrow and incorrect interpretation of *Caldwell*—an interpretation which effectively eviscerates the holding in that case. Third, the majority has also mischaracterized the prosecutor's comments here in order to force them outside the ambit of *Caldwell*. And finally, the majority has erroneously implied that other remarks by the trial court, prosecutor and defense counsel were sufficient to cure the comments of any constitutional impropriety.

The Prosecutor's Argument

The majority opinion gives the facts of the alleged *Caldwell* violation short shrift. But I think it is important to understand exactly what the prosecutor said here. The comments at issue were made by the prosecutor in his closing argument at the sentencing phase of Sawyer's capital trial. The prosecutor, in describing the jury's role, remarked:

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you*

of reversal, that any remark by a prosecutor in argument that might have a tendency to minimize the jury's sense of responsibility in a capital case had "no effect" on its sentencing decision. Such a test, for example, would make objecting a doubtful tactic, for an objection might bring a correcting instruction or one to disregard, thus removing the remark as a valid ground for appeal. Nor do we see how such a "no effect" test can lie in bed with the requirement, reiterated after *Caldwell* in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144, 157 (1986), that to obtain habeas relief on the basis of improper remarks by the prosecutor, petitioner must show that they so infected the trial as to deny due process.

13. The dissent in *Tucker* argued for a "no effect" standard for reversal, based on a conclusion of the majority in *Caldwell*. The dissent in *Caldwell* majority opinion, "Because we cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires." 802 F.2d at 1296.

There is no gainsaying that the phrase appears in *Caldwell*, or that it can be read as Judge Kravitch and her two companions in dissent would read it. For a variety of reasons, however, we are not persuaded that the Court intended to impose such a well-nigh impossible burden upon the State as one to show, on pain

I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it

is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).

Caldwell, Donnelly and Darden

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 105 S.Ct. at 2639. The Court noted that the capital sentencing scheme is premised on a "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' [which allows the] Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 330, 105 S.Ct. at 2640 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Court went on to specify a number of "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.¹ Turning to

1. Initially, the Court recognized that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do—limits that jurors often might not understand." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 240. The Court also noted that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can freely 'err' because the error may be corrected on appeal." *Id.* at 331, 105 S.Ct. at 2641 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. The sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather,

Williams, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. The sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather,

the facts before it, the Court concluded that the prosecutor's comments sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the eighth amendment's heightened need for reliability. *Id.* at 340, 105 S.Ct. at 2645. As the Court "[could not] say that [the State's] effort had no effect on the sentencing decision," it was compelled to vacate the death sentence. *Id.* at 341, 105 S.Ct. at 2646.

In reaching its conclusion, the Court was careful to distinguish, on two separate grounds, the fourteenth amendment fundamental fairness inquiry of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), from the case before it. First, the trial judge in *Donnelly* had agreed that the prosecutor's remarks in that case were improper and had given the jury a strong curative instruction. By contrast, in *Caldwell*, the trial judge not only failed to correct the prosecutor's remarks, but in fact openly agreed with them. *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. Second, the prosecutor's remarks in *Donnelly* were ambiguous and did not so prejudice a specific constitutional right as to amount to a denial of that right. The remarks in *Caldwell*, in contrast, "were quite focused, unambiguous, and strong" and "were pointedly directed at the issue that [the] Court has described as 'the principal concern' of [its] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." *Id.* at 340, 105 S.Ct. at 2645 (citation omitted).

er, the decision would present "the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns"—namely the desire to avoid responsibility for the decision. *Id.* Finally, given the fact that a capital sentencing jury is "made up of individuals placed in a very unfamiliar situation and called on to make a difficult and uncomfortable choice," an uncorrected suggestion that the ultimate determination of death rests elsewhere presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 105 S.Ct. at 2642.

2. In *Darden*, the Court wrote that:
There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sen-

The Court subsequently clarified the reach of *Caldwell* and *Donnelly* in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden*, the Court was confronted by a variety of challenges to the prosecutor's closing argument at the guilt phase of a capital murder trial. The Court relied on *Donnelly* in treating the relevant question as "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). The *Darden* majority was quite careful, however, to distinguish the facts in front of it from those in *Caldwell*.³ The *Darden* Court specifically limited *Caldwell* "to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 106 S.Ct. at 2473 n. 15. As the prosecutor's comments in *Darden* did not mislead the jury as to its role in the sentencing decision, *Caldwell* was inapplicable.

Standard of Review

I differ with the majority on the appropriate standard by which to review the comments at issue here. The majority, relying on *Darden* and *Donnelly*, holds that the fundamental question, in this case as in other habeas cases involving improper prosecutorial comments, is whether the petitioner has demonstrated that the remarks rendered the trial fundamentally unfair so as to deny due process.⁴ A fair reading of

tencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden, 106 S.Ct. at 2473 n. 15.

3. The genesis of this proposition may be found in the Eleventh Circuit's decision in *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir.1986) (en banc), cert. denied, — U.S. —, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). In *Tucker*, the court "borrowed" the prejudice prong of *Strickland* in

Caldwell and *Darden* cannot support this conclusion.

In *Caldwell*, the Court wrote: "Because we cannot say that this effort [to minimize the jury's sense of responsibility for determining the appropriateness of death] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341, 105 S.Ct. at 2646. The majority, while recognizing that the phrase exists and that the "no effect" test is a plausible interpretation of the Court's language, concludes, for a variety of reasons, that the Court could not have meant to place a higher burden on the State in an eighth amendment *Caldwell*-type situation than would otherwise be borne under the due process jurisprudence of *Donnelly* and its progeny. I find the majority's reasoning unpersuasive.

The majority argues that the adoption of the "no effect" test would impose a "well-nigh impossible burden upon the State." According to the majority, the State would be forced to show that any remark which tended to minimize the jury's sense of responsibility in a capital case had no effect on the sentencing decision. That is not so. In order to qualify as a *Caldwell* violation, the prosecutor's remarks concerning the jury's role must be "focused, unambiguous and strong." *Id.* at 340, 105 S.Ct. at 2645. Moreover, the remarks would typically be made at the sentencing phase of trial rather

order to apply the *Donnelly* fundamental fairness standard to *Caldwell*-type violations. See *Tucker*, 802 F.2d at 1295. That decision was roundly criticized by three judges in dissent. The dissenting opinion in *Tucker* discussed a number of shortcomings in the Eleventh Circuit's approach. The dissent noted, for example, that *Strickland* and *Caldwell* are fundamentally different in their assignment of the burden of proving prejudice. *Tucker*, 802 F.2d at 1298 (dissenting opinion). Unlike *Strickland*, *Caldwell* places the prejudice burden on the State. "Once the petitioner has shown that the prosecution attempted to minimize the jury's responsibility at the capital sentencing hearing, the state must show that 'this effort had no effect on the sentencing decision.'" *Id.* (quoting *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646). The dissent also stressed that while "the government is not responsible for, and hence not able to prevent, [defense] attorney errors that will result in reversal," see *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2087, "the state can control prosecutorial

er than during voir dire, see *Byrne v. Eler*, 845 F.2d 501, 509 (5th Cir. 1988), during the guilt-innocence stage, see *Darden*, 106 S.Ct. at 2473 n. 15. Finally, remarks must not be corrected by an appropriate instruction from the trial court. *Caldwell*'s "no effect" test, therefore, limited to a subset of particularly forceful prosecutorial comments on a narrow topic generally presented to a capital jury at the sentencing phase of trial, which are not corrected by the trial court. So, while the burden on the State may in fact be "weigh impossible," it is borne only in a narrow class of cases.

The majority also argues that the "no effect" test cannot be squared with *Darden*'s reaffirmation of the *Donnelly* test in most cases involving improper remarks by a prosecutor. The principles of *Caldwell*, however, were not applicable in *Darden*. *Darden*, 106 S.Ct. at 2473 n. 15. Since the prosecutor's comments in *Darden* could not have misled the jury into thinking that it had a reduced role in the sentencing process, any eighth amendment argument was unconvincing and the Court felt free to apply the more generally applicable due process standard of review. *Darden* did not hold that the *Donnelly* standard should be applied to *Caldwell* violations. If it had, the Court would not have needed to go to such great lengths to distinguish *Caldwell*.⁵ See *id.* It is clear, therefore, that in

conduct and, in the capital sentencing context, is constitutionally obligated to do so." *Tucker*, 802 F.2d at 1298 (dissenting opinion). Finally, the dissent found it significant that the Supreme Court itself "did not apply its *Strickland* prejudice analysis to *Caldwell*'s claim of prosecutorial misconduct at sentencing but instead reaffirmed the long line of cases requiring heightened reliability in capital sentencing proceedings." *Id.*

4. By reviewing Justice Blackmun's dissenting opinion in *Darden*, which was joined by three of the other four members of the *Caldwell* majority, the error in the majority's analysis can be readily discerned. In *Darden*, the dissent charged that the Court rejected "the 'no effect' test set out in *Caldwell*" without identifying which standard it was using. *Darden*, 106 S.Ct. at 2480 (Blackmun, J., dissenting). The Court responded to the dissent's charges by distinguishing *Caldwell* so that it could apply the *Donnelly* standard to the facts before it. At no

the peculiar eighth amendment context of the *Caldwell* violation, a stricter standard of review applies.⁴ Prosecutorial comments which truly qualify as *Caldwell* violations cannot be reviewed under the *Donnelly* standard.⁵

Nature of a *Caldwell* Violation

I also differ with the majority's description of the nature of what has come to be called a *Caldwell* violation. Not content with *Darden*'s express limitation of *Caldwell* to a particular type of prosecutorial comment at the sentencing phase of trial, the majority would further restrict the reach of *Caldwell* to those rare instances in which the trial court expressly approves the prosecutor's improper remarks. Essentially, the majority would make the trial court's imprimatur a prerequisite to finding a *Caldwell* violation. The majority's position is based on a tortured reading of *Caldwell*.

The majority ignores the fact that the Supreme Court framed the *Caldwell* issue throughout the majority opinion solely in terms of the prosecutor's remarks:

In this case, a prosecutor urged the jury not to view itself as determining whether

point, however, did the Court take issue with the dissent's characterization of the *Caldwell* standard as a "no effect" test.

5. Justice Rehnquist, in his dissenting opinion in *Caldwell*, clearly believed that the Court had rejected the *Donnelly* standard. Justice Rehnquist "[found] unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the [prosecutor's] statements," and concluded that "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable." *Caldwell*, 472 U.S. at 350-51, 105 S.Ct. at 2650-51 (Rehnquist, J., dissenting). Justice Rehnquist chided the Court for not heeding the directives of *Donnelly* and for not applying a fundamental fairness test. *Id.*

6. The panel's discussion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), underscores the error in the majority's adoption of a fundamental fairness standard in this case. In *Chapman*, the Court recognized that some errors necessarily render a trial fundamentally unfair. *Rose*,

the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari . . . to consider petitioner's contention that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's 'heightened need for reliability. . . .'

Caldwell, 472 U.S. at 323, 105 S.Ct. at 2636 (emphasis supplied). The majority opinion in *Caldwell* is divided into approximately thirteen parts and subparts, and the only mention of the trial court's endorsement of the prosecutor's remarks is in Part IV-C of the opinion in which the Court sought to distinguish *Donnelly*. While the Court did note that the trial judge had approved the remarks in the case before it, it did not establish that fact as a prerequisite to its ultimate condemnation of the prosecutor's actions. Rather, the Court identified two important factors which distinguished *Donnelly*. First, the Court looked at the trial court's actions and found that, unlike in *Donnelly*, the trial court not only failed to correct the improper remarks, it also endorsed them. *Id.* at 339, 105 S.Ct. at 2645. Next, the Court looked to the character of

106 S.Ct. at 3106. There are certain constitutional protections so basic to a fair trial that without them, a criminal proceeding cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and the criminal sanction may not be regarded as fundamentally fair. *Id.* Such errors either abort the basic trial process or deny it altogether. *Id.* at n. 6. The *Caldwell* violation presents a clear example of a breakdown in the trial process. The pernicious effects of focused, unambiguous and strong prosecutorial remarks concerning the jury's role in the sentencing process and the inevitability of appellate review are impossible to measure. Consequently, where such remarks are left uncorrected by the trial court, there is an intolerable danger that they affected the sentencing decision. For all the reasons reviewed by the Court in *Caldwell*, such remarks create an unacceptable risk of systemic breakdown, thereby poisoning the reliability of the death sentence. Given that the eighth amendment demands a heightened degree of reliability in any case where the State seeks to take the life of a defendant, the prosecutor's remarks necessarily rendered the proceedings fundamentally unfair. It is our inability to measure the effect of such remarks, combined with the very grave threat to the integrity of the proceedings posed by such remarks, that militates in favor of the "no effect" test.

the remarks and determined that the prosecutor's comments differed from those in *Donnelly* because they were "focused, unambiguous, and strong" and because they prejudiced a specific constitutional right, i.e., an eighth amendment right. *Id.* at 340-41, 105 S.Ct. at 2645-46. The Court went on to confirm that such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the eighth amendment. *Id.*

Given *Caldwell*'s overwhelming emphasis on the character and effect of the prosecutor's argument itself,⁷ the question of whether the trial court endorsed the comments must be viewed as merely a factor in a larger inquiry. A proper inquiry must focus on the nature of the prosecutor's remarks themselves and on the character of the trial court's response to those remarks. Moreover, an evaluation of the trial court's response is not limited to the question of whether the trial court endorsed the remarks. Were this not the case, the Court's references to curative action would be superfluous for silence would be sufficient medicine for what ailed the proceedings. I do not think *Caldwell* can fairly be read, therefore, as holding that the trial court's endorsement of the prose-

cutor's remarks is a prerequisite to an eighth amendment violation. *Nature of the Prosecutor's Remarks*

The majority, casting the prosecutor's remarks in a more favorable light than merit, weaves the threads of an "improper" argument into a hazy story of vague, disjointed and foreshadowing prosecutorial comments. My own reading of the record has led me to conclude that the prosecutor's remarks in this case are sufficiently similar to those constitutionally wanting in *Caldwell* to merit vacation of Sawyer's sentence.

In the instant case, the prosecutor urged the jury:

Don't feel like you are the one, because it is very easy for defense lawyers to make each and every one of you feel like you are pulling the switch. It is not so and if you believe me, there will be others who will tell you to either agree with you or you are wrong. . . .

While the majority is arguably dismissing the first portion of the argument as a permissible "joint-response" argument, it is remiss in not reaching the answer to the query it asks

of the heightened need for reliability by the eighth amendment of sentencing in capital trials.

The prosecutor is free to emphasize the nature of the jury decision. He is to emphasize that the defendant himself is responsible for the consequences of his actions. The prosecutor must certainly not free, however, to diminish the jury's role in the decision by alluding to the specter of appellate review. If, by doing so, the prosecutor may well lead jurors with the notion that their moment in favor of death will be revisited. See *Caldwell*, 472 U.S. at 340 S.Ct. at 2645 n. 7. This may hold true when the prosecutor has stressed that "the decision" is in the jury's hands for "the decision" that case would be the decision to sentence, or the decision to start the ball rolling, or the decision that the jury wants the defendant to live. See *id.* at 330-33, 105 S.Ct. at 2636-39. It would not be the decision demanded by the eighth amendment and required by the eighth amendment that the defendant merits execution because the appropriate punishment for the crime has committed.

7. Justice O'Connor, in her concurring opinion, noted that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.* at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring). Justice O'Connor's concurring opinion focused exclusively on the prosecutor's remarks, never once mentioning the trial court's endorsement of those remarks.

8. The majority also strives to justify the prosecutor's remarks on the ground of practical necessity. Prosecutors need such arguments, the majority suggests, to deal with the "formidable" argument, typically urged as a "last-resort" by struggling defense counsel, that the decision whether the defendant merits execution rests with each individual juror, that human judgment is not infallible, that mistakes can be made and that death is one error which cannot be corrected. The majority points out, as it must, that such arguments are "in varying degrees" true. Those weighty factors, however, are precisely the sort of considerations which society has entrusted the jury to weigh in reaching its decision. Those decisions are at the core

pect to the latter portion: who are the "others" who will be behind the jury to agree with their decision or correct them if they are wrong? The answer is suggested in an earlier comment by the prosecutor:

... what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body ... are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty.

Just as the *Caldwell* prosecutor referred to the ultimate reviewability of the jury's determination, so too did the prosecutor here make several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. As if the intended suggestion was not already clear enough, the prosecutor went on to hammer home his point by explicitly referring to judicial review and by couching his description of the jury's decision in language bespeaking possibility rather than finality:

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day.... All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

The contested remarks here are precisely the sort of comments condemned in *Caldwell* as tending to impart to the jury a view of its role in the capital sentencing procedure that is fundamentally incompatible with the eighth amendment's heightened need for reliability in the death sentence determination. It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecu-

9. The majority, in an effort to bolster its position that the prosecutor's remarks were later

tor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous, and strong." See *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645. The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination. The message of non-finality was clear.

The Trial Court's Response

Having determined that the prosecutor's remarks were inappropriate under *Caldwell*, a question remains whether subsequent action by the trial court was sufficient to preclude reversal. See *Caldwell*, 472 U.S. at 339-40, 105 S.Ct. at 2645; see also *Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), cert. denied, — U.S. —, 108 S.Ct. 310, 98 L.Ed.2d 268 (1987). The majority notes that the trial court delivered a standard form jury instruction informing the jury that it was their responsibility to deliver a sentence of death or life imprisonment. While that much is true, it is equally clear that the trial court did little if anything to correct the damage that was done. This is particularly so with respect to the prosecutor's comments regarding appellate review. Even if the trial court's instructions left the jury with the view that they had an important role to play, they did nothing to undermine the prosecutor's suggestion that the jury's determination would be reviewed by an appellate court to assure its correctness. See *Caldwell*, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n. 7.

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument. I do not presume to establish a general standard by which to judge the efficacy of a trial court's curative instructions in a *Caldwell* violation context. I merely note that in the instant case, the trial court's instructions⁹ were insufficient

"cured", points to the fact that defense counsel informed the jury that "[t]he decision whether

to disabuse the jury of the notion that final responsibility for the sentencing decision might lay elsewhere.

In summary, because I believe that the prosecutor's effort to minimize the jury's sense of responsibility for determining the appropriateness of death cannot be said to have had no effect on the sentencing decision, I believe that the writ must be granted as to the sentence imposed upon Sawyer. I dissent from the majority's decision to affirm the district court's denial of the writ.

ON SUGGESTION FOR REHEARING EN BANC

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.



Robert Sawyer lives or dies is in your hands." That remark was patently insufficient to relieve the jurors of any mistaken impressions they might have held as to their role in the death penalty determination. In fact, any initial confusion by the jury might well have been exacerbated by defense counsel's espousal of a position contrary to that which the prosecutor seemed to embrace. The jury may have understood the remark, made just after the prosecutor

Zachary ROGERS, Petitioner-Appellee,

James A. LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellant.

No. 87-4011.

United States Court of Appeals, Fifth Circuit.

June 30, 1988.

State prisoner petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., granted the writ, and state appealed. The Court of Appeals, Johnson, Circuit Judge, held that state committed constitutional error in closing argument to jury during sentencing phase of trial, and error was not harmless.

Affirmed.

1. Constitutional Law — 268(8)

Prosecutorial statements may violate due process in two ways; statements may implicate a specific provision of the Bill of Rights incorporated into the Fourteenth Amendment by the due process clause; if statements do not implicate any such incorporated constitutional right, they may constitute a denial of due process generally, sometimes called a "generic substantive due process" violation. U.S.C.A. Const. Amend. 14.

2. Constitutional Law — 268(8)

In case of an asserted "generic due process" violation in a prosecutorial statement, court asks whether prosecutor's comments so infected trial with unfairness as to make a resulting conviction or sentence a denial of due process; under the test, although the asserted misconduct may have made the defendant's trial less than

had finished insinuating that the jury's decision was not final, to signify the existence of a true dispute on the role of the jury. Therefore, defense counsel's remark, when considered along with the prosecutor's earlier comments, may well have added to the cloud of uncertainty billowing around the jury about its own role. Consequently, the majority's reliance on the curative properties of defense counsel's remark is misplaced.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

APR 9 8 38 AM '87

LOUISIANA WHITE
CLERK

ROBERT SAWYER

CIVIL ACTION

VERSUS

NUMBER: 86-223

FRANK BLACKBURN, WARDEN

SECTION: "I" (4)

ORDER

The Court, after considering the petition, the record, the law applicable to the case, and the Magistrate's Finding and Recommendation, hereby approves the Magistrate's Finding and Recommendation and adopts it as its opinion, with the comments and corrections noted herein.

In view of the serious nature of the petitioner's allegations pertaining to the trial court's appointment of counsel with less than five years experience in violation of Article 512 of the Louisiana Code of Criminal Procedure, the Court makes the following additional comments:

The petitioner contends that the trial court's noncompliance with Article 512 of the Louisiana Code of Criminal Procedure deprived him of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution. We find it unnecessary to reach the merits of the petitioner's equal protection and due process claims, because even if the trial court's appointment of counsel with less than five years experience violated the petitioner's Fourteenth Amendment rights, the record reveals that the error was harmless beyond a reasonable doubt. Because we assume for argument's sake that an error was committed, we must now engage in a two-part analysis: (1) Can this type of error ever be treated as harmless, and (2) if so, was the violation harmless in this case.

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Discussing the purpose and the application of the federal harmless error rule, the United States Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), noted: "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23. The Chapman court gave examples of such "basic" constitutional rights: the right to counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the right to be tried by an impartial judge, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and the right to have coerced confessions deemed inadmissible at trial, Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). By contrast, there are other constitutional errors "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless" Chapman, 386 U.S. at 22.

The petitioner contends that the trial court's appointment of counsel with less than five years experience violated one of his "basic" constitutional rights therefore making a harmless error inquiry improper. Furthermore, the petitioner asserts that the harmless error principle can never be applied to due process or equal protection claims. We find no merit in petitioner's arguments. A due process or equal protection error, like most other constitutional errors, can be held harmless. See Cancler v. Maggio, 550 F.2d 1034 (5th Cir. 1977); Hills v. Henderson, 529 F.2d 397, 401-02 n.8 (5th Cir. 1976). The only time a harmless error inquiry is not appropriate is when the constitutional right violated is included in Chapman's "so basic to a fair trial" category. Any right to five-year counsel in a capital case is not included in this category.

Our next inquiry is whether the trial court's appointment of counsel with less than five years experience constitutes harmless error in this

case. The Chapman court pronounced that an error is not harmless where there is a "reasonable possibility" that the error complained of "might have contributed to the conviction". Chapman, 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). The Court placed the burden upon the state to prove that the error was harmless. Chapman, 386 U.S. at 24. Although the Supreme Court continues to rely upon Chapman in its harmless error decisions, the Court has shifted its inquiry from whether the error "might have contributed to the conviction" to whether there was overwhelming independent evidence of guilt. Under the revised test, an error is harmless where, absent the error, the evidence was so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. United States v. Hastings, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96, 108 (1983); Brown v. United States, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208, 215 (1973); Milton v. Wainwright, 407 U.S. 371, 377-78, 92 S.Ct. 2174, 2177-78, 33 L.Ed.2d 1, 6-7 (1972); Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). This overwhelming independent evidence test is consistent with the purpose of the harmless error rule as stated in Chapman -- to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. Moreover, the United States Fifth Circuit has recognized the overwhelming independent evidence test as the proper harmless error standard. Germany v. Estelle, 639 F.2d 1301 (1981), Harryman v. Estelle, 616 F.2d 870 (1980).

After examining the record, and the effect of the trial court's noncompliance with Article 512 in this particular case, we conclude that

ny error committed by the trial court in not appointing five-year counsel was harmless beyond a reasonable doubt.

In light of the recent United States Supreme Court ruling in Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) which addressed the same issue as that raised by Mr. Sawyer in ground ten of his application for habeas corpus relief, we find it necessary to comment upon the effect of that decision in the case at hand.

The petitioner has alleged that the state trial court's removal of a juror who expressed opposition to the death penalty deprived him of the right to have his guilt or innocence determined by a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. In January of 1986, this Court stayed the execution of the petitioner pending a ruling on the same issue by the United States Supreme Court in Lockhart v. McCree. The Supreme Court rendered its decision on May 5, 1986. The Lockhart court held that the removal of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors does not violate the requirement that a jury must represent a fair cross section of the community.

After carefully reviewing the record and transcript in this case, we conclude that the petitioner's claim is without merit. The record supports the state trial court's determination that the juror's opposition to the death penalty would have prevented her from properly and impartially applying the law to the facts, thereby substantially impairing the performance of her duties as juror.

The Court makes the following corrections to the Magistrate's Finding and Recommendation:

Page 1, lines 15-16: the citation should read "Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)".

Page 6, lines 18: "even" should read "ever".

Page 7, line 31: "grounds" should read "ground".

Page 11, footnote 4, line 4: the citation should read: "Coco v. Winston Industries, Inc., 341 So.2d 332, 335 n.1 (La. 1976)".

Page 14, line 5: the citation should read "McCrae v. Blackburn, 793 F.2d 684, 688 (5th Cir. 1986)".

Page 14, line 6: "more" should read "less".

Page 24, line 9: "of itself" should read "in itself".

Page 30, line 18: "[d]oes" should read "does".

Page 30, line 20: the citation should read "28 U.S.C. §2254".

Page 34, line 37: "merely" should read "nearly".

Page 35, line 25: "the" should read "this".

Page 37, line 24: "the" should read "that".

Page 39, line 15: a comma should follow "specific intent".

Page 42, footnote 8, line 10: "inapposit" should read "inapposite".

Page 44, lines 15-16: the citation should read "Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)".

Page 45, line 9: "constitutinal" should read "constitutional".

Page 45, footnote 9, line 6: "[a]dequately" should read "adequately".

Page 45, footnote 9, line 8: "offenses" should read "offenders".

Page 46, line 14: the citation should read "Sawyer v. State, 442 So.2d 1136 at 1139-40".

Page 49, line 5: "[t]he" should read "the".

Accordingly,

IT IS ORDERED that the application filed on behalf of petitioner, Robert Sawyer, is hereby DENIED.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on January 21, 1986 is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

Henry A. Mentz
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER
VERSUS
FRANK BLACKBURN, WARDEN

CIVIL ACTION
NUMBER: 86-223
SECTION: "I" (4)

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J U D G M E N T

For the reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of the defendant, Frank Blackburn, Warden, and against the petitioner, Robert Sawyer, dismissing the petitioner's application for a writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay of execution entered by this Court on January 21, 1986 be and is hereby RESCINDED.

New Orleans, Louisiana, this 9th day of April, 1987.

Henry A. Mentz v.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER
versus
FRANK BLACKBURN, WARDEN

CIVIL ACTION
NUMBER 86-223
SECTION "I" (4)

FINDING AND RECOMMENDATION

On January 21, 1986, this matter was referred to the United States Magistrate for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. §636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Robert Sawyer is a state prisoner incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on September 19, 1980 of First Degree Murder after trial by jury in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana. The jury recommended that petitioner be sentenced to death.

Petitioner's conviction and sentence was affirmed on appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 335 (1983); See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence.

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Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983). The United States Supreme Court denied a subsequent application for certiorari. 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

Petitioner was represented at the trial court level by James S. Weidner, Jr., Esquire, and by Samuel Stephens, Esquire. He was represented on his direct appeal by David Katner, Esquire, and by George Escher, Esquire.

In his application for habeas corpus relief under 28 U.S.C. §2254, petitioner alleges a violation of the Constitution and laws of the United States as follows:

1. "The death-qualification of petitioner's guilt-phase jury was illegal and unconstitutional."
2. "Petitioner was denied the right of effective assistance of counsel in violation of his rights of equal protection and due process under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
3. "Petitioner received ineffective assistance of counsel from his court appointed attorney in violation of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
4. "Prosecutorial misconduct during closing argument in the penalty phase of the trial rendered petitioner's trial fundamentally unfair in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution and Article 1, Section 2, 3 and 13 of the Louisiana Constitution of 1974."
5. "Petitioner was denied his right to a fair sentencing under the Eighth and Fourteenth Amendments of the United States Constitution and under the Louisiana Constitution, because the prosecutor injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence."

6. "Petitioner was denied his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and his right under Art. 1, Section 16 of the Louisiana Constitution of 1974 to decide for himself whether or not he would testify at trial."
7. "The trial court did not instruct the jury during the guilt/innocence phase of petitioner's trial that the defendant is not required to testify and that no presumption of guilt may be raised, thereby violating petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Louisiana."
8. "The trial court's instruction to the jury at the guilt/innocence phase of his trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."
9. "The trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."
10. "The trial court excused jurors, who expressed only general opposition to the death penalty, depriving petitioner of the right of a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the laws and Constitution of the State of Louisiana and the standards set in Witherspoon v. Illinois, 391 U.S. 510 (1968)."

11. "The imposition of a death sentence where one of the aggravating circumstances is not supported by the evidence violates the Eighth and Fourteenth Amendments."
12. "Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the introduction of inadmissible evidence that defense counsel had no effective opportunity to rebut during the capital sentencing hearing said evidence injected on arbitrary factor into the sentencing hearing."
13. "Petitioner's sentence is excessive and disproportionate."
14. "Petitioner's sentence is arbitrary and capricious."
15. "Electrocution is a cruel and unusual means of punishment."
16. "Petitioner's sentence is invidiously discriminatory."
17. "Capital punishment is an excessive penalty."
18. "The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights."

These grounds¹ were presented in an application for post-conviction relief to the state trial court. An evidentiary hearing was conducted by the trial court before denying petitioner's application.

Petitioner applied for writs of certiorari and review with the Louisiana Supreme Court of the trial court's denial of his application. The Louisiana Supreme Court denied petitioner's application without comment. *Sawyer v. Maggio*, 479 So.2d 360 (La. 1985).

¹Grounds 4, 11 and 12 additionally were presented to the Louisiana Supreme Court in petitioner's appeal of his conviction.

Application for reconsideration was denied. 480 So.2d 313 (La. 1985).

The duplicate record of the Louisiana Supreme Court is before this Court. This record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C. §2254(b); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following statement of facts which are set forth in the opinion of the Supreme Court of Louisiana, recounting the events which led to petitioner being charged with murder.

"A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant

had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died." [Footnotes omitted]. State v. Sawyer, 422 So.2d 95, 97-98 (La. 1982).

1. The Death Qualification of Petitioner's Guilt-Phase Jury Was Illegal and Unconstitutional

Petitioner claims that he was denied his right to a fair trial under the Sixth, Eighth and Fourteenth Amendments because a qualified group of venire persons were excluded from both the penalty phase and the guilt phase of his trial on the grounds that they were opposed to the death penalty.

This issue is without merit, having been foreclosed by the Supreme Court's recent decision in Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); See Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986).

2. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in grounds two and three of his application. Since the claims in both grounds are related, we will treat both claims together.

Petitioner first contends that he was denied the effective assistance of counsel by the failure of the state trial court to appoint an attorney with at least five years of experience to represent him.

Petitioner, an indigent, was entitled to court-appointed counsel. He was originally represented by Wiley Beevers who had been admitted to practice in Louisiana for over five years. Mr. Beevers, after reaching irreconcilable differences,² with petitioner was allowed to withdraw as counsel. The state trial court appointed James Weidner, Jr. to represent petitioner. Mr. Weidner advised the court that he had not been admitted to practice for five years but was told to associate counsel with the required number of years of experience.

Mr. Weidner, at the time of petitioner's trial, had been admitted to the practice of law approximately four years. Mr. Weidner attempted, but was unsuccessful in securing an attorney to assist

²Mr. Beevers testified during the state's evidentiary hearing that the irreconcilable differences consisted of petitioner refusing to follow his advice to enter a plea of guilty to second degree murder or first degree murder without capital punishment. (R., Evidentiary Hearing, July 12, 1985, p. 16). Had petitioner accepted the offer of a plea agreement, he could only have received a sentence of life imprisonment. LSA R.S. 14:30.1.

him at trial. (R., Tr., Evidentiary Hearing, July 12, 1985, p. 120). He was successful, however, in engaging Samuel B. Stephens to assist him with petitioner's case.³ At the time of trial, Mr. Stephens was just a few weeks shy of having been admitted to practice five years. (R., Petitioner's State Exhibit Z).

Louisiana law provides:

"When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel." Louisiana Code of Criminal Procedure (La. C.Cr.P. Art. 512).

Although it may be necessary to consider the performance by Messrs. Weidner and Stephens in connection with the above claim, the issue raised by petitioner is not an ineffective assistance of counsel claim, but essentially a denial of equal protection.

The state trial judge, after an evidentiary hearing, concluded that noncompliance with the directive of Article 512 is not fatal to a capital conviction when a defendant actually receives effective assistance of counsel.

³Mr. Weidner also secured the services of John Tooley, an attorney with over twenty-eight years experience, to assist him in pre-trial hearings.

The trial judge for reasons orally assigned held:

"The man [Weidner] did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say 'You have to have been in business at least five years.'

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality." (R., Tr., Evidentiary Hearing, July 12, 1985, p. 190).

Prior to the Louisiana Supreme Court's remand with directions to conduct an evidentiary hearing, the state trial court issued written reasons substantially identical to those above in its initial denial of petitioner's application. (R., Reasons for Judgment, February 8, 1985, pp. 2-3).

At the conclusion of the evidentiary hearing conducted on July 12, 1985, the state trial judge denied petitioner's application for post-conviction relief on the above, as well as other grounds raised.

The Louisiana Supreme Court denied, without comment, petitioner's application for certiorari and review of the trial court's ruling.

The requirement that an attorney possess a minimum of five years experience before he can be appointed to represent a defendant charged with a capital crime is a requirement of state law.

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While we are bound by determinations of state law by courts of that state, *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *Willeford v. Estelle*, 538 F.2d 1194 (5th Cir. 1976); *Hall v. Wainwright*, 493 F.2d 37 (5th Cir. 1974), we are unable to locate any other case in which the highest court of Louisiana has given the same interpretation to Article 512 as did the state trial court herein.⁴

The state trial court in its written reasons of February 8, 1985 concluded that petitioner's due process and equal protection rights were not violated by the failure of the court to appoint him an attorney with five or more years experience. (R., Reasons for Judgment, supra, p. 5). We do not have to reach the issue of whether petitioner's due process or equal protection rights were violated since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state trial court concluded in its assigned oral reasons that petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner] ...we had a mature and reasoned

⁴The refusal of the Louisiana Supreme Court to grant writs in the case *sub judice* does not constitute a ruling on the merits. See *State v. Guillot*, 353 So.2d 1005, 1007 n.1 (La. 1977); *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 n.1 (La. 1977). The Louisiana Supreme Court appeared to take the same approach taken by the state trial court herein in determining whether the dictates of Article 512 were violated in *State v. Motton*, 395 So.2d 1337, 1342 (La. 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981), when it held, on a record silent as to the length of time of practice of an appointed attorney, that the defendant failed to establish prejudice.

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and in some ways seasoned certainly beyond his physical, years, for the defense of this gentleman."⁵ (R., Evidentiary Hearing, July 12, 1985, p. 187).

A review of the state record convinces us that petitioner received the effective assistance of counsel in Mr. Weidner's representation.

The only prejudice that petitioner seeks to establish is not having been represented by counsel with at least five years experience is the alleged deficient conduct set forth in his claim of ineffective assistance of counsel. We find that claim to be meritless for reasons assigned below.

The state court record and the trial transcript reveal that the evidence of petitioner's guilt was ample. Petitioner's exculpatory statement introduced into evidence at trial by the state alleged that Lane was responsible for the acts causing the victim's death. However, defendant did not seriously contest at trial his involvement in the beating and burning of the victim. The theory of his

⁵In the earlier stages of the criminal proceeding, petitioner was represented by Mr. Beevers, who met the time qualifications of Article 512. After Mr. Beevers withdrew as petitioner's attorney, Mr. Weidner along with Mr. John Tooley represented petitioner at hearings on pre-trial motions. At trial, Mr. Weidner had the assistance of Sam Stephens. Mr. Tooley had been a member of the bar for over twenty years. Mr. Stephens had been a member for four years, eleven months and a few weeks. Although Messrs. Tooley and Stephens were not appointed by the court to represent petitioner, a distinction perhaps with little difference, it would appear that petitioner was at all times represented by counsel within the spirit, if not the letter of Article 512.

defense was that he lacked the specific intent to commit first degree murder due to intoxication. Ms. Shano testified that she saw petitioner kick Ms. Arwood into the bathtub rendering her unconscious. (R., Tr., pp. 1146-49). She also saw petitioner pour hot water on Ms. Arwood, walk all over her back as she was lying on the floor and beat her with a belt. (R., Tr., pp. 1149-50). Ms. Shano also testified that she overheard petitioner say, "[I] can show you how cruel I can be..." just before she smelled something burning. (R., Tr., p. 1151). Ms. Shano also overheard conversations between Lane and petitioner which indicated petitioner set fire to Ms. Arwood. (R., Tr., p. 1152).

The fingerprints found on the can of lighter fluid used to set Ms. Arwood on fire belonged to petitioner. The Louisiana Supreme Court found the evidence "ample" from which a rational juror could have found that the defendant was engaged in the perpetration of aggravated arson and that he had acted with specific intent. *State v. Sawyer*, supra, 422 So.2d at 99. The court's determination is entitled to great weight. *Wingo v. Blackburn*, 786 F.2d 654 (5th Cir. 1986). Webster's New Collegiate Dictionary defines ample as "generous or more than adequate in size, scope, or capacity... generously sufficient to satisfy a requirement or need".

Petitioner does not address the deficiency of appellate counsel, both of whom he claims had not been admitted to practice for more than five years at the time of their representation of him.

The record reflects that these attorneys presented both meaningful and serious issues to the Louisiana Supreme Court in petitioner's appeal.

Petitioner does not suggest other issues appellate counsel might have urged on appeal. Petitioner must establish "...[t]hat counsel's errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment." *McCrae v. Blackburn*, 793 F.2d 684 (5th Cir. 1986). Any error in the appointment of appellate counsel with more than five years experience to represent petitioner is likewise harmless beyond a reasonable doubt.

Petitioner's claim that he was denied equal protection of the law in the appointment of counsel with less than five years experience is without merit.

Petitioner raises several instances of alleged deficient conduct on the part of his counsel in his claim that he did not receive the effective assistance of counsel.

He claims that counsel:

- a) was admitted to practice for less than five years;
- b) objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;
- c) failed to object during voir dire to the prosecutor's reference to evidentiary facts that were not later established at trial;
- d) failed to conduct a meaningful voir dire;
- e) failed to discuss with petitioner the nature of the defense;
- f) failed to allow petitioner to testify during the guilt phase of the trial;

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- g) failed to adequately prepare defense witnesses for trial;
- h) failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;
- i) failed to present a closing argument during the guilt phase of the trial;
- j) presented an unprepared defense during the penalty phase of trial;
- k) failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;
- l) failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and
- m) failed to make effective closing argument during penalty phase of trial.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show: 1) that his counsel's performance was deficient; and, 2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984).

Under the Supreme Court's formulation of the required showing of prejudice,

"[T]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2068.

If the Court finds that petitioner has made an insufficient showing as to either one of the two stages of inquiry, i.e. deficient performance or actual prejudice, the Court may dispose of the claim without addressing the other stage. *Strickland v. Washington*, *supra*, 104 S.Ct. at 2069-70.

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In determining whether counsel's performance falls below the objective standard of reasonableness, our scrutiny should be "highly deferential", recognizing "...strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Strickland v. Washington, supra, 104 S.Ct. at 2066; Marler v. Blackburn, 777 F.2d 1007 (5th Cir. 1985).

Petitioner may not simply allege prejudice, he must affirmatively prove it. Strickland v. Washington, supra, 104 S.Ct. at 2067; Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984), cert denied, ___ U.S. ___, 105 S.Ct. 3490, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983).

We now treat petitioner's individual claims of ineffective assistance of counsel.

a) Counsel's Admission To Practice For Less Than Five Years

Mere inexperience alone will not determine whether a defendant received effective assistance of counsel. The test rather is counsel's performance in representing the defendant. United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109; United States v. Radolato, 701 F.2d 915 (11th Cir. 1983).

Petitioner has not established that trial and appellate counsel's failure to meet the five year admission to practice minimum resulted in any prejudice to him. Counsel were effective. Petitioner does not show that the results of the trial or appeal would have been any different had counsel with more experience been appointed.

b) Counsel Objected To The Prosecutor Advising The Jury Panel During Voir Dire Of The Penalties For A Lesser Included Offense

Petitioner suggests that the jury should have been made aware that he could have been sentenced: 1) to life imprisonment, without benefit of parole, probation or suspension of sentence if it returned a guilty verdict of second degree murder; or, 2) twenty years imprisonment on a verdict of manslaughter. Petitioner does not explain, however, how this prejudiced him since it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder. Petitioner's contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence.

We are convinced, in view of the evidence, that the verdict would not have been different had the jury been made aware of the alternate penalties.

c) Counsel Failed To Object During Voir Dire To The Prosecutor's Reference To Facts Not Later Established At Trial

Petitioner singles out two references made by the prosecutor during voir dire examination to support his claim. The references are to claims by the prosecutor that "...[S]he [the victim] had a hammer shoved up her vaginal area as well as other incidents"; and "she was halfway drowned in the bathtub and set on fire after she was raped". (R., Petition, pp. 12-13).

The second referenced statement above was not a mischaracterization of the evidence ultimately produced during the trial. There is support in the evidence offered at trial that the victim was "halfway" drowned in the bathtub and set on fire after she was raped.

There was no evidence introduced during trial, however, which would support the first referenced statement that a hammer was used in the attack upon the victim.

Had counsel objected to the remark during voir dire, the jury's verdict would not have been different. The reference by the prosecutor to the use of the hammer, viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict.

Defense counsel did request a mistrial during the testimony of a state witness who alluded to the possible use of a hammer during the attack on the victim. The court denied the motion and instructed the jury that up to that point in the trial, there had been no testimony about a hammer and to disregard the witness's comment. (R., Tr., pp. 1282-1285).

Petitioner suffered no prejudice by the prosecutor's earlier remark.

d) Counsel Failed To Conduct A Meaningful Voir Dire

Petitioner complains that counsel failed to inquire during voir dire examination of the prospective jurors' prior jury service and their attitude regarding the failure of a defendant to testify in his own behalf.

Petitioner does not articulate how he was prejudiced by counsel's failure to find out if a juror had prior jury service. It would be pure speculation to consider that one or more of the

selected jurors would have been excused if it was known that he or she had served on a prior jury.

Additionally, petitioner has not established if there were in fact any jurors who had prior jury service.

Likewise, counsel's failure to inquire of the jurors' attitude regarding a defendant's failure to take the stand does not entitle petitioner to relief herein.

Counsel did not plan to call petitioner to the stand during the guilt phase of the trial. He testified during the state evidentiary hearing that he did not ask the prospective jurors about their attitude toward a defendant not taking the stand on his behalf, to avoid emphasizing the fact that petitioner would not in fact testify. It was a tactical decision. (R., Evidentiary Hearing, July 12, 1985, pp. 146-47).

e) Counsel Failed To Discuss The Nature Of His Defense With Petitioner

Petitioner claims that counsel did not consult with him about his defense and refers to an affidavit filed in the state record as Exhibit "AA" in support of this claim.

The allegations in petitioner's affidavit belie any contention that he was not apprised of the defense that was going to be presented on his behalf. He admitted discussing the case with counsel on several occasions, and on one occasion was told that "alcohol psychosis" would be advanced as a defense to the crime.

Petitioner's claim that he was not advised of his defense before trial is contradicted by his own affidavit, as well as Mr. Weidner's testimony during the state evidentiary hearing.

f) Counsel Failed To Advise Petitioner Of His Right To Testify On His Own Behalf

Petitioner, in connection with this claim, complains that he was not given the opportunity by his attorney to make his own decision as to whether he would testify on his own behalf. Petitioner claims that he would have testified given the choice.

Petitioner, however, does not indicate what his testimony would have consisted of, had he been allowed to testify. He testified during the penalty phase of the trial that he remembered little about the events of the night. (R., Tr., p. 1508).

The fact of petitioner's prior conviction for involuntary manslaughter could have been revealed during the guilt phase of the trial had petitioner taken the stand, a factor that could not but further damage any defense petitioner presented. In fact, petitioner's prior conviction, and its possible revelation during the guilt phase of the trial was a major reason his counsel decided not to put him on the witness stand. (R., Evidentiary Hearing, July 12, 1985, p. 126).

Petitioner's exculpatory statement, given the police shortly after his arrest, in which he put the blame for the victim's injuries on his co-defendant was read to the jury during the state's case in chief.

Had petitioner testified at trial, he may have had difficulty in reconciling for the jury his defense of lack of intent to commit

the crime due to intoxication, and his prior statement that someone else committed the crime.

We cannot second-guess counsel's strategy in not calling petitioner to the stand. The decision not to do so was not outside the realm of effective representation.

Mr. Weidner testified during the state evidentiary hearing that he consulted with petitioner on several occasions concerning not calling him as a witness. (R., Evidentiary Hearing, July 12, 1985, p. 124-25). It was not brought out, however, if counsel, as claimed by petitioner, gave him an opportunity to make the decision himself as to whether he wanted to testify. Petitioner does not claim he made a request of his counsel to testify, he merely asserts he was not given an opportunity to make that choice.

Even assuming that petitioner in fact was not given the opportunity by counsel to make that decision, he has failed to establish that he was prejudiced by the alleged error. Petitioner does not indicate what his testimony would have been had he testified during trial.

g) Counsel Failed To Adequately Prepare Defense Witnesses For Trial

Petitioner complains that his attorney called only five witnesses in his defense and spent only one-half hour with two of those witnesses, his sister and brother-in-law, in preparing their testimony for trial.

Brevity of time spent by counsel in preparing a case is not of itself sufficient to provide relief to a habeas applicant.

Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985).

Petitioner does not indicate what additional facts would have been established at trial had counsel spent more time with the two witnesses mentioned above. It is unclear by petitioner's statement that "a total of only five defense witnesses were called to testify," whether he is complaining that other witnesses should have been called. One of petitioner's present counsel filed an affidavit in the state court proceedings that petitioner's sister gave her the names of several witnesses who would have been available to testify at petitioner's trial. (R., Application for Writs to Louisiana Supreme Court, No. 84 KP 0919, Exhibit S). This list of potential witnesses all appear to be relatives of petitioner. There are no allegations, however, as to what their expected testimony would be.

Without specific allegations of the expected testimony of other witnesses and some indication that they would have been available to testify at trial, petitioner has failed to establish prejudice.

h) Counsel Failed to Call An Expert To Give An
Opinion As To The Effect Of Alcohol On Petitioner

Petitioner, while acknowledging that his attorney obtained the testimony of two physicians in aid of his defense of toxic psychosis, complains that his attorney should have procured other experts who, presumably after examining petitioner, would be able to testify as to the effect alcohol has on petitioner.

The two experts who testified on petitioner's behalf were Doctors Albert DeVilliere and Genevieve Arneson, psychiatrists, who had been appointed to a pre-trial lunacy commission to examine petitioner. Each examined petitioner approximately for one-half hour

in connection with that earlier proceeding and concluded that petitioner understood the nature of the charges filed against him and was able to assist his attorney in his defense.

Counsel for petitioner was successful at trial in eliciting opinions from these two experts which supported the defense of toxic psychosis. (R., Tr., pp. 1337, 1338, 1409).

Petitioner complains, however, that these opinions were based upon a set of hypothetical facts only, and that counsel should have procured an expert who could have testified as to the actual effect of alcohol on him.

Petitioner does not suggest what type of examination would produce the type of results he seeks or that those results would even be obtainable.

Dr. DeVilliere testified both at trial and during the sanity commission proceeding that there are no tests to determine a man's intent or the effect of toxic psychosis on that intent at the time of the crime. He claimed that a physician would have to be at the scene of the crime during its commission to be in a position to render such an opinion. (R., Tr., pp. 436, 1314).

Petitioner offers no evidence that establishes he actually suffered from toxic psychosis to justify our considering his claim.

i) Counsel Failed to Present A Closing Argument
During The Guilt Phase of Trial

Petitioner complains that his attorney was deficient in not presenting a closing argument during the guilt phase of trial.

Mr. Weidner testified during the state evidentiary hearing that he made a deliberate decision not to give a closing argument based upon two separate considerations. First of all, he was knowledgeable of the prosecutor's reputation for presenting strong and damaging rebuttal arguments. Since the prosecutor had given what Weidner considered to be a "mild" closing argument, he hoped to prevent, by not giving a closing argument, the prosecutor presenting a stronger rebuttal. (R., Evidentiary Hearing, July 15, 1985, p. 128).

Secondly, Weidner realized the strong case the state had against his client as to his guilt and felt the chance of salvaging anything for his client was in the penalty phase where he hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk what credibility he may have had with the jury by advancing arguments as to petitioner's innocence that the jury might perceive to have been totally unsupportable.

While an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do find that to be the result in the case before us.

Mr. Weidner believed the case against his client on the guilt phase to be very strong. Prior counsel, Beevers, had withdrawn from the case after he and Sam Dalton, a Jefferson attorney experienced in the defense of capital cases, failed to convince petitioner to accept a plea bargaining agreement to plead to the lesser charge of second degree murder. They likewise had believed the case against petitioner to be very strong. (R., Evidentiary Hearing, July 15, 1985, p. 14-15.).

Under the circumstances, the jury could not help but to have understood the nature of petitioner's defense. They were apprised of it during voir dire and counsel's opening statement. The testimony of defense witnesses as to aspects of the theory of defense was simple and direct. Counsel's participation in the entire trial was quite active. See Martin v. McCotter, No. 85-1311, slip. op. 8385-86 (5th Cir. August 13, 1986).

We are convinced that had counsel presented a closing argument, the jury's verdict would not have been different.

j) Counsel Presented An Unprepared Defense During The Penalty Phase Of The Trial

Petitioner complains that counsel did not conduct a proper investigation in connection with the penalty phase of his trial which resulted in the failure to call other witnesses or present mitigating evidence.

With the possible exception of the names of relatives contained in his attorney's affidavit mentioned above, petitioner does not identify these additional witnesses or the substance of their testimony. He does not indicate what additional evidence his sister would have offered.

Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization.

The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses in the penalty phase of the trial.

Petitioner has not established prejudice in connection with the above issue.

k) Counsel Failed To Object Or Move For A Mistrial During Improper Argument By The Prosecutor During The Penalty Phase Of Trial

Petitioner, in support of the above claim, refers to statements made by the prosecutor which are set out in claims of alleged error in his application for relief, i.e., claims 4 and 5 below.

We find no prejudice to petitioner based upon the above alleged error for reasons that will be obvious when we treat this issue more fully in connection with petitioner's claims 4 and 5 below.

l) Counsel Failed To Object To Erroneous Instructions Given Jury By Court During Guilt And Penalty Phase Of Trial

Petitioner claims that counsel should have objected to the trial court's a) failure to instruct the jury as to how they should treat a defendant's failure to testify; b) instruction on intent; and, c) instruction defining principals.

We will treat below petitioner's complaints as to b and c above, in connection with related issues raised in claims 8 and 9.

As to counsel's failure to object to the court's charge to the jury in that it did not include a charge as to how the jury should treat a defendant's failure to testify on his behalf, Mr. Weidner testified during the state hearing that he purposely requested the court to omit that charge to avoid calling undue attention to the fact that petitioner did not take the stand. (R., Evidentiary Hearing, July 12, 1985, pp. 150-51). Mr. Weidner's decision falls within the definition of trial strategy.

If the particular charge had been included in the court's instructions, the result of the trial would not have been different.

m) Counsel Failed To Make An Effective Closing Argument During The Penalty Phase Of The Trial

Counsel's argument during the penalty phase of the trial is contained in approximately one typewritten page of the trial transcript.

Petitioner complains that the argument was cursory, perfunctory and unpersuasive. We conclude that it was unpersuasive because it was unsuccessful, but lack of success of itself would not result in a conclusion that counsel was ineffective.

The remarks of counsel were of a cursory and perfunctory nature, but petitioner has not established that the jury's recommendation would have been different had counsel dealt longer on mitigating factors favoring him. There was little available by way of mitigation in petitioner's favor.

4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner complains that the prosecutor was guilty of misconduct when he made references to the possibility of a pardon for petitioner if the jury recommended life imprisonment. Additionally, he claims that the assistant district attorney's appeal to a "war on crime", or "community expectation" argument to the jury prejudiced

him. The portions of the rebuttal argument to which petitioner objects follows:⁶

"At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statute (sic) does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. Tr.Tr. 986:14-29.

...if the law which we have in this state is to have any piece [sic], if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the lines because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for killing a four year old child, then what are the people of this Parish to believe. They are going to believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect.... Tr.Tr. 987-17-29; 988:1-6." (R., Petition, p. 17).

⁶Petitioner also refers us in his petition to the prosecutor's entire closing argument and rebuttal, both in the guilt and penalty phase of the trial in support of his claim of prosecutorial misconduct without pointing out specific portions of the argument as constituting error. Mere conclusory allegations of error are insufficient to support a claim for relief. See *Ross v. Estelle*, 694 F.2d 1008 (5th Cir. 1983).

The Louisiana Supreme Court discussed in its opinion affirming petitioner's conviction, the prosecutor's reference to the possibility of a pardon, and found petitioner's claim to be without merit.

That Court held:

"...There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. *State v. Willie*, 410 So.2d 1019 (La. 1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See *State v. Lindsey*, 404 So.2d 466 (La. 1981), and *State v. Willie*, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the 'living death of life imprisonment', which implied that defendant could never be released. Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations." [Footnotes omitted]. *State v. Sawyer*, supra, 422 So.2d at 104.

We do not disagree with the Supreme Court's conclusion on this issue. Nor do we find merit to petitioner's claim that the prosecutor's use of a "war on crime" argument or his appeal to the jury that the community might not understand a verdict which did not impose the death penalty prejudiced him. See *Whittington v. Estelle*, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 464 U.S. 983, 104 S.Ct. 428, ___ L.Ed.2d ___ (1983).

A prosecutor is permitted in closing argument to state to the jury what he believes to have been established and to comment fairly on it. *Whittington v. Estelle*, supra.

Prejudicial comments by a prosecutor in closing argument will justify federal habeas relief only if the error was material in the sense of a crucial, critical and highly significant factor. *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); *Lowery v. Estelle*, 696 F.2d 333 (5th Cir. 1983).

A prosecutor's improper argument to the jury

"...[d]oes not present a claim of constitutional magnitude which is cognizable in a proceeding under 28 U.S.C. 2254 unless such argument is so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." *Whittington v. Estelle*, supra, at 1421.

In viewing the remarks of the prosecutor in the context of the entire trial, which we must, we conclude that the remarks were not so prejudicial as to render the trial fundamentally unfair.

Since petitioner was not prejudiced by the remarks, petitioner is not entitled to relief on his claim of ineffective assistance of counsel presented in claim 3, k above.

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5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner additionally complains of the following closing remarks by the prosecution as being prejudicial:

"...you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. Tr.Tr. 982: 6-21.

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. Tr.Tr. 984:10-21." (R., Petition, p. 18).

The issue raised by the above quoted argument of the prosecutor is a vague reference to the possible review of the jury's verdict by a higher court.

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An argument by a prosecutor, in the penalty phase of a capital case, which suggests to the jury that its responsibility is lessened by appellate review has been condemned in *Caldwell v. Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The state prosecutor in the case sub judice made another reference to possible review of the jury's verdict by a higher court of which petitioner does not complain.

"It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have cross examined him and gone more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal after Mr. Weidner argues. Thank you." (R., Tr., p. 1519).

Because petitioner did not complain of the comments immediately above, either in his habeas application filed herein or his state habeas proceedings, we cannot consider whether those comments present any grounds for relief.

Although petitioner has not urged error in the prosecutor's comments quoted immediately above, we should, however, consider the possible effect of those comments on the outcome of the proceedings since we are required to view the comments of which petitioner complains in light of the entire record.

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Petitioner's counsel did not object to the prosecutor's comments at the time they were made. The contemporaneous objection rule would not prevent our consideration of the claimed error, as the Louisiana courts themselves in a death case would not be constrained from considering the merits of the issue. *State v. Willie*, supra.⁷

While the prosecutor's comments in the instant case dangerously approach reversible error, we do not believe it actually reaches that mark.

The remarks herein are distinguishable from the prosecutor's remarks condemned in *Caldwell*. In *Caldwell*, the assistant district attorney made the following argument in response to the defendant advising the jury of their awesome responsibility in imposing the death penalty:

'ASSISTANT DISTRICT ATTORNEY:

Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its (sic) fair. I think its (sic) unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you

⁷In fact, in the case sub judice, the Louisiana Supreme Court sua sponte noticed a potential problem with the prosecutor's reference to a possible pardon despite the absence of a contemporaneous objection. *Sawyer*, supra, 422 So.2d at 104. It is perhaps significant that the Louisiana Supreme Court, in fulfilling their duty in death cases to view the record for any apparent error in the record, did not consider apparently that the remarks petitioner complains of above were significantly prejudicial.

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be? Your job is reviewable. They know it.
Yet they ...

'COUNSEL FOR DEFENDANT:
Your Honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY:
Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

'THE COURT:
Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY:
Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shall not kill." If that applies to him it applies to you, insinuating that your decision is the final decision and that they're gonna to take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think its (sic) unfair and I don't mind telling them so.' Caldwell v. Mississippi, supra, at 2637-38.

A consideration by the Caldwell court was that the prosecutor's remarks in that case were "focused, unambiguous and strong" and because the trial judge, not only failed to give a curative instruction, but openly approved the prosecutor's remarks. Caldwell v. Mississippi, supra, at 2645.

The comments complained of herein were ambiguous and not merely as strong as the comments in Caldwell. The court's

instructions to the jury in the case herein did not lend support to the prosecutor's statements concerning appellate review. To the contrary, the trial court, after meticulously instructing the jurors on the factors they were to consider in their deliberations, concluded with the injunction, that "[I]t is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or to life imprisonment." [Emphasis added]. (R., Tr., p. 1527).

The prosecutor's remarks complained of herein, while suggesting possible appellate review, were not sufficient to form a conclusion that the jury's responsibility was lessened by appellate review. The prosecutor told the jury in effect that you [the jury] by recommending the death penalty will be telling any court that reviews this case that "...[t]his man from his actions could be prosecuted to the fullest extent of the law". (R., Tr., p. 1518).

Reference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty.

As observed in State v. Mattheson, 407 So.2d 1150, 1165 (La. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); quoting State v. Berry, 391 So.2d 406 (La. 1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981) "...virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and the court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard

his responsibility". See also *Moore v. Maggio*, 740 F.2d 308, 320 (5th Cir. 1984); on subsequent application for habeas relief, 774 F.2d 97, 98 (5th Cir. 1985).

Although *Mattheson* was decided prior to *Caldwell*, its rationale appears to comport with the holding in *Caldwell*.

Even considering the prosecutor's remarks in connection with the comments appearing on page 1519 of the trial transcript, petitioner was not prejudiced. Those later comments, although "hinting" that an appellate court might have the final decision on the imposition of the death penalty, the comments are ambiguous at best.

The prosecutor told the jury:

"...[a]nd if you are wrong in your decision, believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions."
(R., Tr., p. 1519). [Emphasis added].

The above quote, when viewed as a whole, would not necessarily suggest to the jury that its responsibility is lessened, considering the prosecutor's statement to the jury to "...have the courage of your convictions".

The standard to be employed in determining whether prejudice resulted from alleged improper remarks by the prosecutor, condemned in *Caldwell*, is the "reasonable probability" test for determining prejudice established by *Strickland v. Washington*, supra. See

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) en banc; *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), rehearing denied, 776 F.2d 1486 (commenting that there is no incompatibility between the standard enunciated in *Caldwell* and that established in *Strickland*). . rehearing en banc denied, 778 F.2d 623 (11th Cir. 1985).

The defendant must show under the appropriate standard, "...that there is a reasonable probability that, but for counsel's [prosecutor's] unprofessional errors, the result of the proceeding would have been different: a reasonable probability is a probability sufficient to undermine confidence in the outcome". *Strickland v. Washington*, supra, 104 S.Ct. at 2068.

In the instant case, the jury found two aggravating circumstances to support its recommendation of the imposition of the death penalty, when only a finding of one would have been sufficient. The evidence of defendant's guilt was ample. There was little in the way of mitigating evidence. The court's instructions properly directed the jury's attention to those factors it was to consider in arriving at a recommendation.

The Louisiana Supreme Court, upon review of the record on appeal, determined:

"We are convinced ... that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning the recommendation on appeal." *State v. Sawyer*, supra, 422 So.2d at 106.

The court's finding is entitled to great weight. *Wingo v. Blackburn*, supra.

We conclude, based on the above considerations, that there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different.

For these same reasons, we conclude that petitioner has failed to establish prejudice on the claim of ineffective assistance of counsel raised in ground 3, k above.

6. FAILURE TO ALLOW PETITIONER THE RIGHT TO MAKE
DECISION AS TO WHETHER HE WOULD TESTIFY ON HIS
OWN BEHALF

Petitioner complains that his attorney made the decision on his own as to whether or not petitioner would testify during the guilt phase of the trial without advising him that he had a right to make that decision himself.

A related issue involving a claim of ineffective assistance of counsel has been disposed of above.

Petitioner does not claim that he ever made a request of his counsel to be allowed to testify. Petitioner does not indicate what his testimony would have been had he made the decision to testify. Petitioner has not established that he was prejudiced by the alleged error.

7. TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO
HOW THEY SHOULD TREAT A DEFENDANT'S FAILURE TO TESTIFY

Petitioner claims that he was prejudiced by the trial court's failure to include an instruction to the jury that a defendant is not required to testify and that no presumption of guilt may be drawn from the fact that a defendant does not testify.

The record reflects that the state judge's instructions to the jury did not contain such a charge.

Mr. Weidner testified at the evidentiary hearing that he requested the trial judge not to include the above charge in the court's instructions as a strategy move to avoid undue attention being drawn to the fact that defendant did not take the stand in his defense.

No error was committed by the court for failing to include the charge since it was purposefully omitted at the request of defense counsel.

We have already disposed of petitioner's allegations that counsel's request to the court to omit the charge constituted ineffective assistance of counsel.

8. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED
STATE OF BURDEN OF PROOF

Petitioner complains that the following instruction given the jury by the trial court had the effect of relieving the state from its burden of proving "specific intent" an element of the crime.

"A specific intent to kill may be implied where there are no external signs of the intent beyond the mere facts of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing. Tr.T. 926:19-24." (R., Tr., p. 1481).

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. LSA Louisiana Code of Criminal Procedure Art. 841. Absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief

to a state prisoner whose claim would not be reviewable in the state court because of the default. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Petitioner does not allege cause for the failure to object to the charge. A claim that the "cause" was due to counsel's ineffectiveness is not sufficient to establish cause. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). See Weaver v. McKaskle, 733 F.2d 1103 (5th Cir. 1984); Stokes v. Procunier, 744 F.2d 475 (5th Cir. 1984).

Even if cause existed for failure to object to the charge, petitioner would not be entitled to relief on the above claim. The complained of charge quoted above is only a small part of the entire instruction given the jury on "specific intent". The quote is taken out of context. A review of the court's entire charge on that element of the offense reveals that the jury was instructed how they may treat various factual circumstances [including the one petitioner complained of] in order to determine whether a defendant had specific intent to kill someone. [Emphasis added]. The court concluded by telling the jury: "Therefore you should determine whether or not there was criminal intent by considering all of the facts and circumstances of this case". (R., Tr., p. 1482).

Because we would determine the charge complained of to have been proper, petitioner's companion claim that counsel's failure to object to the charge constituted ineffective assistance of counsel is without merit.

9. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED
STATE OF BURDEN OF PROOF

Petitioner complains that the following charge on the law of principals improperly relieved the state of its burden to prove specific intent.

"All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principals.

In other words, to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense.

All persons knowing the unlawful intent of the person committing the crime, who were present, consenting thereto, and aiding and abetting either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment. (T.T. 931:5-24)." [R., Tr., p. 1466].

No contemporaneous objection was made in connection with the above charge to the jury and there is no objection of cause for the failure to object to the charge. This claim as well as petitioner's

companion claim of counsel's failure to object to the above charge is without merit.⁸

10. TRIAL COURT ERRED IN EXCUSING A JUROR WHO
EXPRESSED ONLY A GENERAL OPPOSITION TO THE
DEATH PENALTY

Petitioner complains that the court excused a prospective juror after she expressed only a general opposition to the imposition of the death penalty.

⁸Petitioner would not succeed on the merits of this claim. Petitioner argues in his brief that the above instruction might have caused the jury to have found him guilty if they believed that he failed to prevent Lane from beating the victim. Petitioner fails to include the trial court's complete charge on principals which include an instruction that a person cannot be considered a principal under the circumstances suggested by petitioner. (R., Tr., p. 1467). Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), reh'g denied, 697 F.2d 699 (1983) cited by petitioner in support of his claim involved a conspiracy instruction and its holding is inapposite to the conclusion we reach herein. In the instruction given herein, the court charged the jury that a principal is one who "...[k]nowing the unlawful intent of the person committing the crime..., [and] ...consenting thereto...." aids and abets in the commission of the crime. (R., Tr., p. 1466). The prosecutor referred to the law or principals in his closing argument. (R., Tr., p. 1444). However, it was in reference to petitioner being a principal in the aggravated rape of Ms. Arwood. The argument was harmless, since the jury did not find the aggravated rape to have been an aggravating circumstance after the penalty hearing. The evidence at trial established that petitioner did not participate in the crime merely as an aider and abetter. He himself beat the victim, caused her to become unconscious when he kicked her into the bathtub, poured the lighter fluid on her and lit her on fire.

The juror, Gwendolyn Lee, when asked her feelings toward the death penalty, replied:

"What are your feelings about capital punishment?"

A. I don't agree with it.

Q. You say you don't agree with it. That is regardless of what the evidence may show, no matter how heinous of a crime, you are telling me you are morally or religiously, no matter what the evidence may show you could not even consider the imposition of the death penalty?

A. No I don't think it is fair.

Q. You don't think it's fair. You have had this belief for quite some time?

A. Yes.

Q. Is this a religious belief, is the death penalty contrary to your religion?

A. Yes.

Q. You have strong contrary objections to it no matter what the evidence may show.

A. That is right.

* * *

THE COURT:

Let me explain this to you, Mrs. Lee. We do have a death penalty in Louisiana. That doesn't mean it

would be imposed in this case or any other case. What Mr. Weidner is asking you if the facts of this case indicate that the death penalty should be imposed, could you vote for it under those circumstances?

MRS. LEE:

I really don't think I could.

THE COURT:

You don't think you could?

MRS. LEE:

No." (R., Tr., pp. 811-813).

The inquiry that we must make to determine if a juror may be excluded for his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright v. Witt*, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Wicker v. McCotter*, 783 F.2d 487 (5th Cir. 1986).

This test is to be applied primarily by the trial judge and his determination that a juror should be excused because of his or her views on capital punishment is accorded a presumption of correctness under 28 U.S.C. §2254(d). *Wicker v. McCotter*, supra, at 493.

There is support for the trial court's determination that Mrs. Lee's views on capital punishment might substantially impair her performance as a juror.

11. VIOLATION OF PETITIONER'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENT WHEN ONE OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY EVIDENCE

The issue petitioner raises under this claim is essentially a complaint that he was prejudiced in the penalty phase of his trial by the introduction of a crime, the involuntary manslaughter of a child, which was unrelated to any aggravating circumstances upon which the jury could find in imposing the death penalty.⁹

Although petitioner does not articulate the constitutional error present in this claim, it would appear that he is complaining of the same error that was raised in his direct appeal and on which the United States Supreme Court remanded to the Louisiana Supreme Court for further consideration in light of the former Court's holding in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

⁹It is unclear from the petition filed by petitioner whether he is also complaining that evidentiary support for all of the aggravating circumstances found by the jury was required. This issue, if raised, is without merit. This issue was treated fully in petitioner's direct appeal. The Louisiana Supreme Court held that an "...[a]dequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenses properly exposed to the possibility of the death sentence. See *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982) (en banc)." *State v. Sawyer*, 422 So.2d at 101-102.

The court in Zant held inter alia that a death sentence based upon two or more statutory qualifying grounds, one of which was later determined to be invalid, would not automatically require reversal of the death penalty unless it was determined that the deficient ground was invalidated on the basis it involved constitutionally protected activity, or the penalty was arbitrary and capricious because the invalidated ground involved the introduction of evidence not otherwise admissible.

On remand, the Louisiana Supreme Court held that the holding in Zant did not preclude the affirmance of the imposition of the death penalty in petitioner's case since the evidence of the manslaughter conviction, even if erroneously admitted to support one of the aggravating circumstances, was properly admitted to shed light on petitioner's character. Sawyer v. Louisiana, 442 So.2d 1136 at 1139-40.

A defendant's character constitutes valid considerations by the jury during the penalty phase of the trial. LSA Louisiana Code of Criminal Procedure Art. 905.2.

Petitioner's application for writ of certiorari to the United States Supreme Court from the decision of the state court after remand was denied. Sawyer v. Louisiana, ___ U.S. ___, 104 S.Ct. 1719, ___ L.Ed.2d ___ (1983).

Petitioner does not raise a constitutional question under the present claim as the evidence of manslaughter conviction was properly admissible under Louisiana law to establish petitioner's character, an important and relevant issue during the penalty phase of the trial.

12. INADMISSIBLE EVIDENCE WAS INTRODUCED DURING PENALTY PHASE OF TRIAL

Petitioner next complains about the prosecutor's reference during the penalty phase of the trial to the hearsay statements of uncalled witnesses, that the child, who was the victim of the Arkansas manslaughter conviction, was the victim of prior physical abuse at the hands of petitioner.

Petitioner refers in his petition to the following statements of the prosecutor as objectionable:

"If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that (sic) constantly beaten by your brother, would you believe those six people? (See T.T. p. 961)." (R., Tr., p. 1496).

"I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such...." See T.T. 961-962. (R., Tr., p. 1496-97).

Petitioner goes on to complain that subsequent to the second statement quoted above, the prosecutor elicited testimony from the state's witness about information that the child was the victim of prior abuse, which information was contained in the hospital report prepared on the date the child was admitted with her fatal injury.

The prosecutor apparently used this material in an attempt to counteract the favorable testimony of petitioner's sister that he took good care of the child.

Petitioner admitted in his testimony during the penalty phase of the trial that the child did have bruises on her body the day she was brought to the hospital. He denied that the prior injuries were caused by him, but laid the blame on the child's mother.

Petitioner did not object at trial to the testimony of which he now complains herein. The contemporaneous objection rule is not an issue in considering this claim, however, since the state has not raised the rule in connection with this claim in its response to the petition. See *Miller v. Estelle*, 677 F.2d 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

Hearsay testimony, with certain limited exceptions, is generally inadmissible. We can only conclude, without any suggestion to the contrary by the respondent, that the statements and testimony complained of herein were inadmissible.

The admission of the testimony complained of above must have resulted in a denial of fundamental fairness to entitle him to habeas corpus relief in this Court. *Scott v. Maggio*, 695 F.2d 916 (5th Cir. 1983).

"...[t]he mere erroneous admission of prejudicial testimony does not in itself, justify federal habeas relief unless it is 'material in the sense of a crucial, critical, highly significant factor,' in the context of the entire trial." *Menzies v. Procnier*, 743 F.2d 281, 288 (5th Cir. 1984) quoting *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983).

Petitioner admitted that he had spanked the child with a belt on several occasions prior to her death. Any reference by the prosecutor, in light of that admission, that he had statements from six people that petitioner constantly beat the child was harmless.

Petitioner has failed to demonstrate fundamental fairness.

Petitioner additionally complains about the use, during his cross-examination, of a prior statement he gave in connection with the Arkansas case. He claims that the prosecutor introduced the statement without first establishing at trial that the statement was voluntary.

Petitioner failed to establish prejudice. The burden of proof in an habeas application is upon the habeas petitioner. *Walker v. Maggio*, 738 F.2d 714 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 793, ___ L.Ed.2d ___ (1985); *Hayes v. Maggio*, 699 F.2d 198 (5th Cir. 1983). Petitioner has set forth no facts which would suggest that the prior statement was not voluntary.

13. PETITIONER'S SENTENCE IS EXCESSIVE AND DISPROPORTIONATE
14. PETITIONER'S SENTENCE IS ARBITRARY AND CAPRICIOUS
15. ELECTROCUTION IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT
16. PETITIONER'S SENTENCE IS INVIDIOUSLY DISCRIMINATORY
17. CAPITAL PUNISHMENT IS AN EXCESSIVE PENALTY
18. THE CUMULATIVE EFFECT OF VIOLATIONS OF PETITIONER'S RIGHTS IS IN ITSELF A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

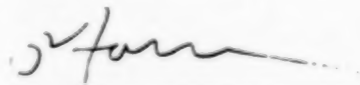
The grounds for relief raised in the above six claims are conclusory in nature. Petitioner offers no support in fact or law to justify their consideration.

RECOMMENDATION

It is recommended that the application for writ of habeas corpus filed on behalf of petitioner, Robert Sawyer, be DENIED and that the stay of execution be VACATED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 8 day of September, 1986.


RONALD A. FONSECA
United States Magistrate

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CAPITAL SENTENCING
Ch. 3

Art. 905.8

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

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CAPITAL SENTENCING
Ch. 3

Art. 905.9

4. Remand
Upon finding reversible error in post-verdict sentencing hearing in a homicide prosecution, reviewing court should not reverse conviction, but only sentence of death, and should remand case in order that trial court may resentence convicted defendant to life imprisonment without benefit of probation, parole, or suspension of sentence. State v. English, Sup 1979, 367 So 2d 815.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

Supreme Court Rule 28

Rule 905.9.1. Capital sentence review (applicable to La.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

- (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
- (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

- (a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.
- (b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.
- (c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substan-

Art. 905.9

CODE OF CRIMINAL PROCEDURE
Title 30

tial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 1. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

- i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.
- ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.
- iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan. 1, 1978.

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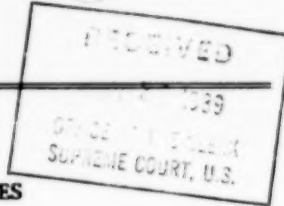
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NO. 89-5809



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT SAWYER,
PETITIONER

VERSUS

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,
RESPONDENT

OPPOSITION TO WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
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COURTHOUSE ANNEX
GRETN, LOUISIANA 70053

COUNSEL FOR RESPONDENT

44012

REASONS FOR NOT GRANTING THE WRIT

I. The United States Fifth Circuit Court of Appeal interpreted the decision of Caldwell v. Mississippi as a "new rule" of law within the meaning of Teague v. Lane and this interpretation is supported by the decisions in the United States Court of Appeal for the Tenth Circuit and the United States Court of Appeal for the Eleventh Circuit and does not present a conflict in the Circuits such that this Court should grant the writ.

II. The Fifth Circuit's determination in Sawyer v. Butler that a Caldwell violation does not fall within either of the Teague exceptions does not promote a grant of this writ despite a different conclusion by the Tenth Circuit in Hopkinson v. Shillinger.

III. Since prosecutorial remarks do not violate the Eight Amendment if analyzed under the standards for review of such claims formulated by this Court in Donnelly-Caldwell-Darden, review is not necessary.

LIST OF PARTIES

The parties to the proceeding below were:

ROBERT H. BUTLER, SR.,
FORMER WARDEN, LOUISIANA STATE PENITENTIARY

LARRY SMITH,
APPOINTED INTERIM WARDEN, LOUISIANA STATE PENITENTIARY

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL FOR THE STATE OF LOUISIANA

JOHN M. MAMOULIDES,
DISTRICT ATTORNEY FOR JEFFERSON PARISH

ROBERT SAWYER,
PETITIONER

ELIZABETH W. COLE
AND
CATHERINE HANCOCK
ATTORNEYS FOR PETITIONER
TULANE UNIVERSITY LAW CLINIC

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NO. 89-5809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT SAWYER,
PETITIONER

VERSUS

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,
RESPONDENT

OPPOSITION TO WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

I. Course Of Proceedings Below

Petitioner was convicted of first degree murder and sentenced to the penalty of death on September 19, 1980. His conviction and sentence were affirmed by the Louisiana Supreme Court. See State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence. See Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983). A second application for certiorari to the United States Supreme Court was denied. See Sawyer v. Louisiana, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Petitioner filed an application for state habeas relief which resulted in an evidentiary hearing on July 25, 1985. After a full hearing, relief was denied with opinion by the Twenty-Fourth Judicial District Court. See Appendix A. Relief was further denied without opinion by the Louisiana Supreme Court. See Sawyer ex rel v. Maggio, 480 So.2d 313 (La. 1985). Lastly, Petitioner applied for federal habeas

relief which was denied. See Sawyer v. Blackburn, No. 86-223 slip op. (5th Cir. April 8, 1987). Petitioner was then granted a certificate of probable cause and a stay of execution and appealed to the United States Court of Appeal for the Fifth Circuit which denied his petition on June 30, 1988. See Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). A rehearing en banc was granted by the Fifth Circuit. After oral argument the parties were asked to file supplemental briefs concerning three questions in regard to the applicability of Teague v. Lane. The En Banc Court issued its opinion August 15, 1989, denying relief in a 9-5 decision.

II. Statement Of The Facts

The United States District Court, Eastern District of Louisiana, adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana.

"A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

"On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

"Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

"The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten,

scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

"After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

"Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or the adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

"Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

"Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

"Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

"In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died." State v. Sawyer, 422 So.2d at 97, 98 (La. 1982)

REASONS FOR DENYING THE WRIT

I.

The United States Fifth Circuit Court of Appeal interpreted the decision of Caldwell v. Mississippi as a "new rule" of law within the meaning of Teague v. Lane and this interpretation is supported by the decisions in the United States Court of Appeal for the Tenth Circuit and the United States Court of Appeal for the Eleventh Circuit and does not present a conflict in the Circuits such that this Court should grant the writ.

FIFTH CIRCUIT

The Fifth Circuit En Banc determined that the rule of law issued in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), so defined is a "new rule" within the meaning of Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and that Sawyer's Caldwell argument is Teague-barred unless Caldwell fits within either of Teague's two exceptions. In reaching its decision the Fifth Circuit recognized that there was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional footing. Additionally, Caldwell was certainly new in its conclusion that such arguments violated the Eighth Amendment. Sawyer v. Butler, No. 87-3274, slip op. at 5549 (5th Cir. August 15, 1989) (en banc). The court further concluded that Caldwell was more than a straight forward application of Donnelly to new facts but was a greatly heightened intolerance of misleading jury argument and as such, Caldwell was a "new rule" within the meaning of Teague.

The Fifth Circuit rejected Sawyer's two arguments which contended that this heightened standard for review of prosecutorial argument does not create a "new rule". The court concluded that, although the Louisiana Supreme Court condemned remarks similar to Caldwell-type prosecutorial arguments, it did so under state law and not because it regarded such arguments as Eighth Amendment violations. Furthermore, the Fifth Circuit rejected Sawyer's contention that this Circuit previously decided that Caldwell is not a "new rule" in Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 476 U.S. 1176, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986). In rejecting Sawyer's second argument, the court distinguished between the meaning of "newness" in writ abuse cases from its meaning in procedural bar cases. In conclusion, the Fifth Circuit repeated the Supreme Court dicta in Teague that a rule is new for purposes of Teague if it has not been accepted at the time the petitioner's conviction became final. Teague, 109 S.Ct., at 1070.

The Fifth Circuit repeated its conclusion in Sawyer that the Caldwell "last word" ruling is a new constitutional rule of criminal procedure under Teague in Hill v. Puckett, No. 87-4922, slip op. at 212 (5th Cir. Oct. 10, 1989). Since Hill's conviction became final on November 7, 1983, the court refused to apply Caldwell retroactively since it did not come within the stated exceptions under the Teague rule. It should be noted that Judge Henry A. Politz was one of five dissenting in the Sawyer en banc opinion, but one of the three panel majority in the Hill opinion.

TENTH CIRCUIT

The Tenth Circuit, United States Court of Appeal, arrived at the same conclusion as the Fifth Circuit in its most recent decision Hopkinson v. Shillinger, No. 86-2571, slip op. at 11 (10th Cir. Oct. 24, 1989), where it determined that "consistent with our opinion in Dutton v. Brown, the rule in Caldwell falls within the 'new rule' proscription of Teague, and, therefore, cannot be applied in this proceeding unless it falls within one of the two exceptions permitted by Teague." Hopkinson v. Shillinger, slip opinion, p. 11.

Prior to the Hopkinson decision, the Tenth Circuit in Dutton v. Brown, 812 F.2d 593 (10th Cir.) (en banc), cert. denied, 108 S.Ct. 116 (1987), determined that Caldwell articulated a Supreme Court decision regarding a constitutional principle that had not been recognized previously. The court further ruled in Dutton that the failure of counsel to raise a constitutional issue reasonable unknown to him satisfied the "cause requirement". In Hopkinson, the court

reasoned that the Eighth Amendment jurisprudence of the Supreme Court prior to Caldwell did not visibly compel the outcome in Caldwell. It noted that California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) and Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1984) inclined in the opposite direction and had to be specifically addressed and distinguished in Caldwell. Furthermore, the court repeated the Caldwell majority's justification for its holding that the Eighth Amendment's heightened "need for reliability and the determination that death is the appropriate punishment in a specific case" as a basis to maintain its decision.

Moreover, the Tenth Circuit also rejected the contention that a state court proscription of conduct similar to that involved in Caldwell would establish a claim available under the United States Constitution.

ELEVENTH CIRCUIT

The Eleventh Circuit arrived at the same conclusion regarding a Caldwell claim in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on denial of rehearing, 816 F.2d 1493 (1987). In Adams, the court held that respondent's Caldwell claim was so novel at the time of his trial in October, 1978, and his sentencing and appeal in early 1979, that its legal basis was not reasonably available at that time. It further ruled that based on the novelty of the issue, respondent had established cause for his procedural default. Subsequently, the Eleventh Circuit's opinion was reviewed by the United States Supreme Court in Dugger v. Adams, 489 U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), where this Court specifically stated "we believe that the Eleventh Circuit failed to give sufficient weight to a critical fact that leads us to conclude, without passing on the court of appeal's historical analysis, that Caldwell does not provide cause for respondent's procedural default." Dugger, supra, at 1215. The Eleventh Circuit further repeated its conclusion that Caldwell represented a significant change in the law in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Clearly, the Eleventh Circuit maintains that a Caldwell issue is a novel claim which would qualify as a "new rule" under Teague and this Court refused to pass on the Eleventh Circuit's analysis in Dugger.

Since three Circuits, the Fifth, Tenth and Eleventh, have resolved the issue of whether a Caldwell claim is a "new rule" of law under Teague, it is not necessary that this Court review that conclusion since there is no conflict among the circuits at this time.

II.

The Fifth Circuit's determination in Sawyer v. Butler that a Caldwell violation does not fall within either of the Teague exceptions does not promote a grant of this writ despite a different conclusion by the Tenth Circuit in Hopkinson v. Shillinger.

Teague, 109 S.Ct. at 1078, held that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions articulated:

1. A rule forbidding criminal punishment of certain primary conduct and a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. Penry v. Lynaugh, 109 S.Ct. at 2952.
2. Rules which require the observance of procedures that are "implicit in the concept of ordered liberty". Teague v. Lane, 109 S.Ct. at 1075, quoting Mackey v. United States, 401 U.S. at 693 (separate opinion of Harlan, J.) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). See Yates v. Aiken, 108 S.Ct. 534 (1988). The scope of the second exception is limited by the plurality opinion in Teague "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague v. Lane, 109 S.Ct. at 1076-77; procedures that are bedrock procedures which are "central to an accurate determination of innocence or guilt." Id. at 1077.

The Fifth Circuit reasoned that, since Sawyer cannot contend that the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution, his Caldwell claims do not qualify for the first exception under Teague. The Fifth Circuit further concluded that Sawyer's Caldwell claims did not fall within the second exception of Teague thereby procedurally barring Sawyer's relief.

In analyzing the applicability of the second exception the Fifth Circuit reformulated the exception to apply in a death case: "Rather, such a petitioner must show that the new rule insists on procedures without which the correctness of the jury's decision to punish by death rather than life imprisonment is seriously diminished." Sawyer, supra, at 5550-51. The Fifth Circuit accepted the Teague pluralities' formulation of the second proviso which expressed a new rule as a "bedrock procedural element" that would be retroactively applied under the second exception. Sawyer, supra, at 5551. The Fifth Circuit interpreted Teague to mean that it could immediately put aside rules that only enhance as distinguished from rules essential to

fundamental fairness. Following this line of reasoning, the Court pointed out that Caldwell manifestly implicated two principles that would be fundamental in the sense required by Teague's second exception:

1. Donnelly's restriction requiring that a proceeding not be "fundamentally unfair" to the defendant;
2. The more expansive regard for jury discretion suggested by McGautha trimmed back by the United States Supreme Court's later interpretations of the Eighth Amendment.

Neither of these principles were relevant to Sawyer's claim since he relies on Caldwell's modification of Donnelly in light of the ideals in McGautha. *Id.* at 5551. The Fifth Circuit further reasoned that if the Caldwell rule was so fundamental as to be "implicit in the concept of order liberty" then a defendant would need only to rely on Donnelly rather than Caldwell, since only those defendants whose prosecutorial argument was not so harmful as to render their sentencing trial "fundamentally unfair" needed to rely on Caldwell. Looking for additional guidance, the Fifth Circuit then turned to the Supreme Court case Dugger v. Adams where the court held that no fundamental miscarriage of justice would result if the procedural default rule were permitted to defeat Adams's Caldwell claim. Thereafter, the Fifth Circuit concluded "because of the similarities between the two doctrines, it is difficult to see why a Caldwell violation should be sufficiently fundamental to require an exception to the 'new rule' doctrine, but not so fundamental as to require an exception to the procedural default doctrine." Sawyer, *supra*, at 5552. After considering the facts of Adams, the Sawyer Court presumed that the disposition in Adams presupposed a judgment about the importance of a Caldwell error to a sentencing determination. Furthermore, Sawyer's Caldwell claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second Teague exception. Thus, Sawyer was procedurally barred from addressing his claim since it did not fall within either exception.

The Tenth Circuit arrived at the opposite conclusion when it analyzed a Caldwell claim and the application of Teague's second exception in Hopkinson v. Shillinger, *supra*. The Tenth Circuit stated that on an abstract level, a rule in capital hearings that no reference to appellate review can be made, or cannot be made without a full description of the appellate process, or that curative instructions must follow references to appellate review do not amount to Eighth Amendment bedrock procedural elements. But the Tenth Circuit, unlike the Fifth Circuit, extended the inquiry to the particular fact situation before it and said "it strikes us as bedrock

procedure that a jury must understand that it, and not an appellate court, carries the responsibility for imposing the death penalty." Hopkinson v. Shillinger, slip opinion at 13. The Court expressed uncertainty as to the scope of Caldwell itself, but regarded the jury's understanding of its core function in a capital sentence hearing to be fundamentally related to the accuracy of a death sentence and thus concluded that a Caldwell claim falls within the second Teague exception and must be considered.

The fact that the Tenth Circuit and the Fifth Circuit disagree on the application of the second Teague exception to the Caldwell issue is a difference in analysis as opposed to a difference in results. The Fifth Circuit based its opinion that the Caldwell decision presented a "new rule" on its interpretation of Caldwell establishing a new standard of review for prosecutorial arguments at the sentencing phase of a capital trial, that is a "no effect" test. The Tenth Circuit concluded that the Caldwell issue was a "new rule" based on its historical analysis that Caldwell was a novel claim.

Under the Fifth Circuit analysis, a defendant whose conviction was final before the Caldwell decision in 1985 would be procedurally barred from using that issue unless he could show that the prosecutorial comments violated his fundamental rights under due process. Thus a claim of a constitutional violation under due process could save a defendant who would be procedurally barred under Teague. But, then, such a defendant would not need the Caldwell case since a reliance on Donnelly would suffice.

The Tenth Circuit concluded that a defendant whose conviction was final before the Caldwell decision in 1985 would not be procedurally barred from pursuing his claim because the Caldwell claim would fit under the second exception of Teague. The Tenth Circuit then would analyze the Caldwell claim under a fundamental fairness standard which included a two-step test that adopted the Mills v. Maryland "substantial possibility" standard.

In an en banc decision, Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), the Tenth Circuit established a two-step process for evaluating a Caldwell issue: (See Darden v. Wainwright, 477 U.S. 168, 184 n.15, 106 S.Ct. 2464, 2473 n.15, 91 L.Ed.2d 144 (1986).) First, the court should determine whether the challenged prosecutorial remarks are the type of statements covered by Caldwell. In other words, they must be statements that tend to shift the responsibility for the sentencing decision away from the jury. If so, the second inquiry is to evaluate the effect of such statements on the jury to determine whether the statements rendered the sentencing decision

unconstitutional." Parks v. Brown, supra, at 1549. The Tenth Circuit thereby established its standard for evaluating a Caldwell issue: if a violation exists, as "is there a substantial possibility that the prosecutor's statements, taken in context, affected the sentencing decision."

The Tenth Circuit reiterated the "substantial possibility" standard in Hopkinson v. Shillinger, slip op. at 21. After reviewing the remarks in question in the context of the entire record the court had no trouble holding that there was no substantial possibility that the comment by the prosecutor unconstitutionally affected the decision of the jury. It further concluded that the same conclusion is reached if a fundamental fairness standard is applied. Hopkinson, slip op. at 25. Thus the Tenth Circuit may allow review under the second Teague exception, but the standard of review is something less than a no-effect test which the Fifth Circuit would apply and not much different from a fundamental fairness test.

Moreover, the Eleventh Circuit, in its discussions of Caldwell issues found in Harich v. Dugger, supra, and Mann v. Dugger, supra, assumes a two-fold approach in reviewing a Caldwell claim. "First, we must determine whether the prosecutor's comments to the jury were such that they would 'minimize the jury's sense of responsibility for determining the appropriateness of death.' Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine 'whether the trial judge in this case sufficiently corrected the impression left by the prosecutor.' McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987)." Mann v. Dugger, 844 F.2d at 1456. The Eleventh Circuit has focused ultimately on the trial court's actions based on the language in Caldwell which said that "rather it stated that such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." The Eleventh Circuit has established a two-fold test which considers the trial courts action thereby rejecting a no-effect test and implementing a test that is some what less stringent than the Fifth Circuit's standard of review.

At this time, review of the opinion in Sawyer v. Butler is unnecessary since its analysis does not differ in results from those in the Tenth and Eleventh Circuits when applied to convictions final before Caldwell. Despite the language used, the outcome for similarly situated defendants would be the same. Since no grave injustice is promoted at this time, review of the Caldwell-Teague-Perry issues is unnecessary.

III.

Since prosecutorial remarks do not violate the Eight Amendment if analyzed under the standards for review of such claims formulated by this Court in Donnelly-Caldwell-Darden, review is not necessary.

A review of the analysis in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 86 L.Ed.2d 231 (1985), and Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), reveals that the standard of review is one of fundamental fairness.

The above standard was clearly stated in Donnelly, in an opinion by then Justice Rehnquist and joined by five other justices. While reviewing two improper remarks in the closing argument of a non-capital murder case, the court in Donnelly declared that they must be viewed in the context of the overall trial. It characterized the remarks as ambiguous and but one moment in an extended trial followed by specific disapproving instructions. While upholding the conviction, the Supreme Court further stated, ". . . we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process." Donnelly, at 1872.

Prior to this final statement the Court clearly settled the standard of review for improper prosecutorial remarks:

"When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, at 1871.

The Court further affirmed that the standard of review on federal habeas was the narrow one of due process, and not the broad exercise of supervisory power that would be used in regard to its own trial court.

Eleven years later the Supreme Court addressed the issue of improper prosecutorial remarks in the sentencing phase of a capital case in Caldwell v. Mississippi, supra. The majority opinion in Caldwell, written by Justice Marshall and joined by four other justices, applied a due process analysis to determine whether the improper prosecutorial remarks constituted a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941); Donnelly v. DeChristoforo, 94 S.Ct. at 1871. As a basis for vacating the death penalty in Caldwell, Justice Marshall used the

standards as found in Donnelly to distinguish the remarks in Caldwell. In both cases the remarks were considered improper and, in order to determine the effect of the remarks, the trials were viewed in their entirety. In Caldwell, Justice Marshall analyzed each possible argument of the prosecutor to permit the improper remarks under the standard of review of Donnelly but found that the remarks in Caldwell violated the Eighth Amendment. Despite Justice Marshall's statement in his closing paragraph¹ regarding "no effect," it was the fundamental fairness analysis of due process that he used throughout the opinion.

Moreover, it is evident from Justice O'Connor's concurring opinion in Caldwell, that she would espouse the due process analysis of the majority. She agreed with the majority except as to the impact of California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), on a policy choice of educating a jury as to post conviction procedures.

Justice O'Connor's position regarding the standard of review is clear when she joins the opinion of Justice Powell in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). If Caldwell left any doubt as to the standard of review for improper prosecutorial argument, Darden cleared it up. The petitioner in Darden challenged prosecutorial remarks at the guilt-innocence phase of a capital trial. The Darden opinion clearly states that when reviewing the prosecution's closing argument it is helpful to place these remarks in context. Darden, 106 S.Ct. at 2471. It further recognized that it

"(I)s not enough that the prosecutor's remarks were undesirable or even universally condemned.' Darden v. Wainwright, 699 F.2d 1031, 1036 (CA11 1983). The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.' Id. at 642, 94 S.Ct., at 1871."

This Court in Darden then used the above standard when it determined that the comments did not deprive petitioner of a fair trial. In reaching this decision the court looked at several factors:

- (1) Did it manipulate the evidence.
- (2) Did it implicate other specific rights of the accused.
- (3) Was it invited by defense counsel.

- (4) Did the judge's instruction reinforce the improper remarks or countermand them.
- (5) Was the weight of the evidence heavy.
- (6) Was the content of the defense counsel's argument effective.

Darden v. Wainwright, 106 S.Ct. at 2472.

The criteria used in Darden were the same as that used in Donnelly and Caldwell and in the panel opinion in Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). This Court has refused to distinguish between types of crimes for analysis purposes: capital versus non-capital. There is no precedent for treating improper argument at the guilt phase differently than at the penalty phase of a capital trial. Unless this Court wishes to impose a standard of review contrary to that used by it in Donnelly-Caldwell and Darden it must review the improper prosecutorial remarks herein under the due process criteria.

Under the Darden standard the entire trial must be reviewed to consider if the comments deprived petitioner of a fair trial. The evidence at Sawyer's trial supported his participation in the brutal, gruesome, and torturous murder of Fran Arwood. The only real issue at the trial was whether his possible intoxication was sufficient to mitigate the specific intent for the crime of first degree murder. The jury found it was not and convicted Sawyer.

It must also be considered whether the prosecutor's comments manipulated or misstated the evidence in closing argument at the penalty phase. In Caldwell, the prosecutor made the following statements which allegedly minimized the jury's sense of importance:

"ASSISTANT DISTRICT ATTORNEY:

Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its fair. I think its unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . (Emphasis added.)

"COUNSEL FOR DEFENDANT:

Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY:

Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

¹"Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S.Ct. at 2646.

"THE COURT:

Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused. (Emphasis added.)

"ASSISTANT DISTRICT ATTORNEY:

Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think its unfair and I don't mind telling them so." Caldwell, at 2637-38. (Emphasis added.)

The key features of the comments and circumstances of the reversible error in Caldwell are the unequivocal statements,² objection by defense counsel,³ reinforcement by the judge,⁴ the comments were not "invited" by defense counsel's arguments and not linked to a valid sentencing consideration. Likewise, the argument was inaccurate and misleading. The Caldwell court explained:

"The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform. Similarly, the prosecutor's argument is not linked to any arguably valid sentencing consideration." Caldwell, at 2643.

The argument in Caldwell urged the jurors to view their decision as only the preliminary step in determining the appropriateness of the death sentence. It created the mistaken impression that automatic appellate review of a death sentence would provide the final determination of whether the death sentence was appropriate. This mistaken impression was reinforced by the judge and not corrected by jury instructions. Therefore, it was reversible error.

The argument in the instant case and the context in which it was made does not exhibit the characteristics of the Caldwell argument. See Petitioner's Appendix, (hereafter referred to as

²"...your decision is not the final decision."

"Your job is reviewable."

"...the decision you render is automatically reviewable by the Supreme Court."

³"Your Honor, I'm going to object to this statement, it's out of order."

⁴"I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands."

PA), pp. 43-58. It was not focused, unambiguous or strong. The Sawyer jurors were never told that they were not the final decision makers. The prosecutor's reference to the courts was made as part of a general statement that included the trial court and the people of the Parish and it was directed at the jurors to emphasize their decision as a unit. See PA-45. The reference to the courts was ambiguous at best and made no mention of review by those courts. The entire focus at this point was that the public would view the sentence of death as a jury determination and not as twelve individual juror's decisions. These comments cannot be construed to have lessened the jury's sentencing role.

The prosecutor then briefly referred to the verdict as a recommendation⁵ and continued by reminding the jurors that "You wouldn't have to make the decision" but for Robert Sawyer's choices, his actions. The prosecutor's use of the word "recommendation" tracts the statute. If this word misled the jury it would have been cured by the judge's jury instructions: "It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment." PA-56.

After reviewing the crime and Sawyer's prior manslaughter conviction, the prosecutor said, "The decision is in your hands." PA-47. Then he referred "to all the judges that are going to review this case after this day...." But when the phrase is read within the context of the entire paragraph, the prosecutor again mentioned the trial court and the people of the Parish. He was reminding the jury that a verdict of death would be telling the community its opinion of the crimes and that this particular crime should be prosecuted to the fullest extent of the law. The prosecutor continued by saying, "It's all your doing," a phrase later corrected by the Fifth Circuit to read "It's all you're doing." Then he reminded the jurors to have the courage of their convictions because there will be others behind them to either agree or to say they're wrong. Such an ambiguous and unfocused statement, made in the context of urging the jurors to have the courage of their convictions, did not decrease their sense of responsibility.

After Mr. Weidner's plea for Sawyer's life, the prosecutor made a rebuttal argument which included an emphasis on the importance of the jury's role in the criminal justice system and the importance of such a decision as a sentencing verdict. When the prosecutor began to talk about

⁵La.Cr.P. art. 905.6: "A sentence of death shall be imposed only upon the unanimous recommendation of the jury..."

La.Cr.P. art. 905.8: "The court shall sentence the defendant in accordance with the recommendation of the jury." (Emphasis added.)

Charles Lane's conviction, the defense counsel objected and it was sustained. As he continued to talk about the aggravating circumstances, the prosecutor again reminded the jurors of their importance. PA-52. He then repeated that they were making a recommendation and referred to "this Court" (the trial court) and to any other court that might review Sawyer's case. These statements are generic and should not be lifted out of the context of the entire rebuttal which emphasized the importance of the jury's role in the criminal justice system and in its decision in this case. He followed this statement with "as a jury based on all the facts and circumstances within your knowledge you recommend the imposition of the death penalty." PA-52. (Emphasis added). Ending the rebuttal with such a strong statement of the jury's role served to reinforce the importance of the jury verdict. The use of the word recommendation was a repetition of the statutory language. Any ambiguity created would have been cleared by the judge's instruction to the jury.

After reviewing the prosecutor's remarks within the entirety of his closing argument it is clear that he continually emphasized to the jurors that it was their decision to impose the death penalty and that they were vital to the criminal justice system in making this decision. Any references to other courts were generic and mentioned with "the people of the Parish and this court." The reference to review was brief and unfocused. Never was appellate review mentioned. None of the remarks and references herein were focused, unambiguous or strong; nor were they inaccurate and misleading. Each time the prosecutor made a questionable reference he coupled it with a remark which emphasized the importance of the jury.

Moreover, the defense attorney did not object to these references, as did the attorney in Caldwell, although he did object to the references to Charles Lane. The failure of defense counsel to object indicates that the overall tone of the prosecutorial argument did not diminish the responsibility of the jury for determining the appropriateness of the death sentence for Sawyer. When the argument is read in its entirety, it is clear that the prosecutor was trying to diminish any individual guilt by jurors if they imposed the death penalty, to urge them to have the courage of their convictions and to remind them that it was the decision of the jury as a whole that would impose death for Sawyer.

Furthermore, the judge in the instant case did not reinforce the prosecutorial comments as the judge did in Caldwell. The trial judge's comments remain an important factor in a Caldwell type case. See Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986), cert denied, 480 U.S.

911, 107 S.Ct. 1359 (1987), 94 L.Ed.2d 529 (1987); Darden v. Wainwright, supra; Donnelly v. DeChristoforo, supra; United States v. Robinson, 485 U.S. ___, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988).

Moreover, the judge instructed the jury:

"Having found Robert Sawyer guilty of first degree murder you must now determine whether he should be sentenced to death or to life imprisonment without, etc. . . ." PA-53. (Emphasis added.)

He continued:

"It is your duty to consider the circumstances of the offense and the character and propensities of Robert Sawyer to determine which sentence should be imposed." PA-53. (Emphasis added.)

These instructions certainly emphasized the importance of the sentencing jury's role.

After discussing aggravating and mitigating circumstances, the judge read the two verdict forms and instructed the jurors as to their use. PA-53, 56. His final words to the jury clearly emphasized the importance of its role:

"It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentence to death or the life imprisonment. Go With Mr. Miller back in the jury room." PA-56. (Emphasis added.)

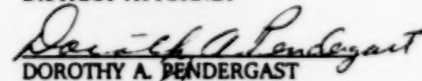
The remarks complained of here are not reversible error as in Caldwell. When viewed in the entirety of the record they did not diminish the role of the jury. The judge not only did not reinforce the remarks but he did instruct the jury that sentencing was its decision and its responsibility. And, when read within the context of the entire trial with the gruesome details of the crime itself and the eyewitness testimony of Cynthia Shano, the verdict of death was not arbitrarily imposed.

CONCLUSION

Sawyer's Caldwell issue not only fails to survive under the Fifth Circuit analysis but also fails under the Tenth and Eleventh Circuits analyses. Review of the Caldwell issue, as presented by Sawyer, and its application with the Teague-Perry framework is unnecessary at this time for the aforementioned reasons and Petitioner's Writ should be denied.

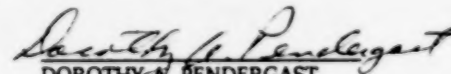
Respectfully Submitted,

JOHN M. MAMOULIDES
DISTRICT ATTORNEY


DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
(504) 368-1020

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been mailed to all parties by placing same in the United States mail, postage prepaid, this 21st day of November, 1989.


DOROTHY A. PENDERGAST

APPENDIX

STATE OF LOUISIANA
VERSUS
ROBERT SAWYER

24TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF JEFFERSON
NO. 79-2841, DIVISION "G"

FILED: _____, 1985
DEPUTY CLERK

J U D G M E N T

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this
8th day of February, 1985.

M. JOSEPH TIEMANN, JUDGE, DIV. "G"

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
Kathy Wagner
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
JEFFERSON, LA.

STATE OF LOUISIANA
VERSUS
ROBERT SAWYER

24TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF JEFFERSON
NO. 79-2841, DIVISION "G"

FILED: _____, 1985
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came for hearing pursuant to a remand from the Louisiana Supreme Court to determine the effect of a violation of C.Cr.P. Art. 512, the claims of ineffective assistance of counsel, and the defendant's (petitioner's) entire application for Writ of Habeas Corpus. Of the twenty (20) claims asserted by petitioner, the Court finds that several of these claims are overlapping, and therefore, will address them by substantive issue presented therein.

Claim I

DENIAL OF DUE PROCESS AND EQUAL PROTECTION
CONSTITUTIONAL RIGHTS BY APPOINTED COUNSEL
WHO HAD BEEN ADMITTED TO THE BAR FOR LESS
THAN FIVE (5) YEARS (C.Cr.P. Article 512)

The record reflects that Robert W. Sawyer, petitioner herein, was indicted for First-Degree Murder on December 7, 1979, and was arraigned on January 24, 1980. At the arraignment, the Honorable Charles Gaudin appointed Wiley Beevers to represent Sawyer, who entered a plea of not guilty. Mr. Beevers had, at the time of the arraignment, more than five (5) years experience at the bar. James Weidner was also appointed by the Court to assist Mr. Beevers. It has been stipulated that Mr. Weidner did not have five (5) years experience at the bar at the time of his appointment. Mr. Beevers later withdrew, and Mr. Weidner was re-appointed on March 27, 1980, as sole counsel of record. Prior to trial, Mr. Weidner engaged the services of Sam Stephens, an attorney who was two (2) weeks short of the five (5) years require-

ment contained in C.Cr.P. Art. 512, which states:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned an assistant counsel.

Sawyer was convicted of First-Degree Murder by a jury of twelve (12) on September 19, 1980. On that same day, the jury recommended the death penalty. For a recitation of the facts, see *State v. Sawyer*, 422 So.2d 95 (La. 1982).

The issue before this Court is whether or not Sawyer's conviction should be reversed based on the technical violation of C.Cr.P. Art. 512. Irrespective of petitioner's contention that the mere violation of this article constitutes a denial of due process and equal protection of the laws, and therefore, should require a reversal, this Court is of the opinion that the legislative intent of Article 512 was to insure effective assistance of counsel to a defendant charged with a capital offense. Article 512 was designed, in this Court's opinion, as a safeguard against inexperienced counsel representing a defendant charged with such a serious offense. A violation of Article 512 could be viewed as a rebuttable presumption that the indigent defendant was not provided with effective assistance of counsel. However, this presumption could be rebutted upon a showing that appointed counsel rendered effective assistance. The purpose of Article 512 would, therefore, be met when such a defendant, in fact, is represented by experienced counsel even though that attorney has slightly less than the requisite five (5) years admission to the bar. In this Court's opinion, the legislature suggested that competence occurs with five (5) years admission. Where competence

is shown to exist, suggestion must give way to reality. In the instant case, the technical mandate of Article 512 was fulfilled when Wiley Beevers, an attorney who at the time of the time of arraignment had considerably more than five (5) years admission to the bar, was appointed as chief counsel to represent Sawyer. In accordance with said Article, James Weidner was appointed by the Court to assist Mr. Beevers. Thus, the genuine issue in this case is whether or not Mr. Weidner actually rendered effective assistance of counsel to Robert Sawyer. This issue will be more fully discussed under petitioner's Claim II. However, pretermittting this issue, respondents allege that the technical violation of Article 512 is, at most, harmless error. According to La. C.Cr.P. Article 912, "a judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." The burden of proving harmless error rests upon someone other than the person prejudiced by it to show that it was harmless. See *State v. Gibson*, 391 So.2d 421 (La. 1980). Thus, respondents herein must prove that the trial court's failure to appoint counsel with five (5) years admission to the bar created little likelihood that such an error would have changed the results reached by the jury. See *State v. Ferdinand*, 441 So. 2d 1272 (La. App. 1 Cir., 1983), writ denied 445 So.2d 1233. Additionally, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) that some constitutional errors may be considered harmless if the beneficiary of the error "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, 386 U.S. 24, 87 S.Ct. 828. After reviewing seven (7) volumes of transcripts and the record, this Court is of the opinion that the error complained of did not constitute a substantial violation of petitioner's constitutional or statutory rights, and that respondents proved, beyond a reasonable doubt, that such an error was not a contributory

No. 79-2841

factor to the verdict reached. As stated in *State v. McLeod*, 6 So.2d 145 (La. 1942), "while the accused is entitled to be protected against an invasion of rights guaranteed by the Constitution, these rights may not be employed on a pretext as a shield to thwart the process of justice." *Id.* at 148. As previously stated, the better inquiry is whether or not the appointed attorney, James Weidner, in fact, rendered effective assistance of counsel, which is to be examined and discussed *infra*.

As regarding petitioner's argument that there was a denial or violation of his constitutional rights to due process and equal protection, the parties have stipulated that as of August 14, 1984, the 39 Louisiana inmates on death row (other than the petitioner) were provided with appointed counsel who had the requisite five (5) years admission to the bar. Petitioner contends that based on the language contained in *Bearden v. Georgia*, U.S. , 103 S.Ct. 2064 (1983), citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031 (1970), certain factors must be examined and weighed in order to determine if a violation of equal protection or due process exists:

- (1) the nature of the individual interest affected;
- (2) the extent to which it is affected;
- (3) the rationality of the connection between legislative means and purpose; and
- (4) the existence of alternative means for effectuating the purpose.

It should be noted that the petitioner is not attacking Article 512 as being unconstitutional; rather, he is asserting that the trial court did not apply Article 512 in such a manner as to provide petitioner with due process and equal protection of the laws, *i.e.*, by the trial court's failure to appoint counsel with the requisite five (5) years admission to the bar.

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With regard to the first element, petitioner's interest consisted of having effective counsel defend his constitutional rights in accordance with the standard espoused by the United States Supreme Court in *Strickland v. Washington*, U.S. 104 S.Ct. 2052 (1984), to be discussed in Claim II. The extent to which petitioner's interest was affected was, in this Court's opinion, not grave or serious enough to warrant a reversal of his conviction for the main reason that, notwithstanding his lack of five (5) years admission to the bar, Mr. Weidner rendered effective assistance of counsel. The reasons for this decision will be provided *infra*. With respect to the rational relation between the State's interest in prosecuting the petitioner in an efficacious manner and the means employed to effectuate their purpose, this Court finds that the trial court's failure to satisfy the mandate of Article 512 does not outweigh the State's interest in protecting society and seeking justice. Lastly, this Court acknowledges that alternative means were available to the trial court, namely, appointing counsel who had been admitted to the bar for five (5) or more years.

In weighing the aforementioned factors in compliance with *Bearden, supra*, this Court is of the opinion that whatever harm, if any, that occurred to petitioner as a result of the trial court's failure to adhere to Article 512, in its entirety, the State's interest in trying the petitioner on behalf of the residents of Louisiana clearly preponderates in favor of not finding a violation of petitioner's due process or equal protection rights.

Claim II

INEFFECTIVE ASSISTANCE OF COUNSEL

By agreement between the State and the petitioner, this issue was submitted on the record, affidavits, stipulations Habeas Corpus petition and its accompanying affidavits.

The leading case for a claim for ineffective assistance of counsel in *Strickland v. Washington*, U.S. , 104 S.Ct. 2052 (1984). As succinctly stated by the United States Supreme Court:

(a) convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., at , 104 S.Ct. at 2054. The Court further indicated that where the defendant fails to demonstrate prejudice, the alleged deficiencies in counsel's performance need not even be considered. According to *Strickland*, *supra*, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." *Id.*, at , 104 S.Ct. at 2070. The standard for attorney performance remains simply "reasonableness" under prevailing professional norms. Thus, based on the holding in *Strickland*, *supra*, a convicted defendant complaining of ineffective assistance of counsel has the burden of showing that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 104 S.Ct. at 2065.

Petitioner sets forth several grounds to support his claim that his trial counsel rendered ineffective assistance which can be grouped together:

(1) Failure to Interview Various Potential Witnesses

It was held in *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984), that "complaints of uncalled witnesses are not favored in federal habeas review..., and the [defendant] must overcome a strong presumption that [counsel's] decision in not calling...a witness

was a strategic one." *Id.*, at 282. This Court is of the opinion that given the strength of the State's case, it was probably strategic on the part of counsel not to call other witnesses who might have made inconsistent statements which would have damaged the defendant's case. Furthermore, under the standard in *Strickland*, *supra*, hindsight is not considered in testing the reasonableness of counsel's performance. Therefore, petitioner has not demonstrated deficient performance which prejudiced his defense.

(2) Failure of Counsel to Allow the Venire to be Informed of the Penalties for the Lesser Included Offenses of Second Degree Murder and Manslaughter.

As stated previously, much deference is given to the strategy of counsel in preparing his defense. This Court can only speculate as to the reasons Mr. Weidner objected to the prosecutor's attempt to inform the venire of penalties for lesser included offenses. Nevertheless, petitioner has failed to show deficient performance on the part of counsel.

(3) Ineffective Representation at the Voir Dire Stage.

In reviewing the transcript of the voir dire examination, it is the opinion of this Court that an attorney's intuition must be given respect when he examines potential jurors. It is common knowledge among the legal profession that "intuitive" feelings of the attorney play a large role as to whom he selects as a juror. This Court must label jury selection as "strategy" on the part of counsel, and hold that petitioner has not proven that Mr. Weidner's conduct was not one of strategy.

(4) Waiver of Closing Argument During Guilt/Innocence Phase.

It is the opinion of this Court that Mr. Weidner's choice in not giving closing arguments falls within the zone of strategy. *William v. Beto*, 354 F.2d 698, 703 (5 Cir. 1965).

(5) Failure to Investigate Character and Expert Witnesses as it Related to the Defense of Intoxication and Penalty Phase.

Petitioner alleges that Mr. Weidner chose only to call three (3) character witnesses at the penalty phase, and therefore, prejudiced his chances of mitigation. This Court opines that Mr. Weidner's strategy in not calling more witnesses to attest to the character of the petitioner was probably to the latter inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215 (5 Cir. 1984):

(r)epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

Id., at 217. Thus, petitioner has failed to show that he was prejudiced. Petitioner further contends that the two psychiatrists called with regard to the intoxication defense were not offered by Mr. Weidner as experts in the field of alcoholism. A review of the transcripts show that both doctors were given hypothetical questions to a situation where an individual consumes a considerable amount of alcohol, and then commits the acts of which petitioner was accused. The opinion of one psychiatrist was that the person was suffering from a toxic psychosis secondary to alcohol. The other psychiatrist testified on direct that the petitioner probably had a sociopathic personality. It is the opinion of this Court that Mr. Weidner's examination was both effective and meaningful considering the strength of the State's case, and that any errors he may have committed with regard to his examination was not sufficient to prejudice the petitioner's defense.

(6) Failure of Counsel to Inform Defendant of his Right to Testify.

Petitioner's Claim III, concerning his denial of the right to decide whether or not to testify, will be addressed here insofar as it bears on the issue in ineffective assistance of counsel. After reviewing the record, affidavits and stipulations, this Court finds no evidence whatsoever to support petitioner's allegation that he was not informed by counsel of his right to testify.

Therefore, this claim is without merit.

(7) Failure of Counsel to Object to Remarks Made by the Prosecutor not in Evidence.

Even should this omission by counsel be considered as unreasonable or below the standard enunciated in *Strickland, supra*, petitioner has failed to prove prejudice sufficient to undermine the confidence in the outcome.

In light of the *Strickland, supra*, holding, petitioner did not meet his burden of proving that counsel's performance was deficient, and that such performance prejudiced the petitioner so seriously that he was deprived of a fair trial. In summary, petitioner has failed to show a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would have had a reasonable doubt respecting his guilt. *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984). This Court notes that not only was Mr. Weidner's representation "reasonable" given the totality of the circumstances, he demonstrated a remarkable ability to defend his client in light of the enormous amount of evidence in the hands of the prosecution. Truly, he demonstrated wisdom beyond his years.

Claim III

FAILURE OF COUNSEL TO INFORM PETITIONER OF HIS RIGHT TO TESTIFY

This issue was addressed under Claim II(6), *supra*.

Claims IV - XX

In his petition for habeas corpus, petitioner also claims that his conviction, or in the alternative, his death sentence, could be vacated because of a host of other errors. This Court has exhaustively studied the record, the transcripts, affidavits and stipulations in connection with petitioner's claims, and believes that those other claims are so seriously lacking in merit that no reasonable jurist could come to a conclusion that is different from the conclusion reached by the Louisiana Supreme Court. *Statefoot v. Estelle*, U.S. , 103 S.Ct. 3383, reh. den. 104 S.Ct.

No. 79-2841

209 (1983). As to these other claims, petitioner has not made a substantial showing of the denial of a constitutional right, recognized by either the State or Federal Constitution. Accordingly, all of petitioner's remaining claims are rejected by this Court.

For the reasons stated hereinabove, petitioner's claims for post-conviction habeas corpus relief are denied.

GRETN, LOUISIANA, THIS 24 DAY OF February, 1985.

M. Joseph Tiemann
M. JOSEPH TIEMANN, JUDGE, DIV. "G"

STATE OF LOUISIANA
VERSUS
ROBERT SAWYER

24TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF JEFFERSON
NO. 79-2841, DIVISION "G"

FILED: _____, 1985

DEPUTY CLERK

J U D G M E N T

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this
24 day of February, 1985.

M. Joseph Tiemann
M. JOSEPH TIEMANN, JUDGE, DIV. "G"

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
Kathy Wagner
CLERK
24TH JUDICIAL DISTRICT COURT
JEFFERSON, LA.

1 THE COURT:

2 No, I'm really trying--

3 MR. CREDO:

4 And I believe that the proper compromise
5 to the State's position and petitioner's
6 position is that the Court can render a written
7 judgment today, if it desires, saying that the
8 petition is denied, and the stay is maintained
9 until such time as the transcript of these
10 proceedings is filed, which will give the
11 petitioner approximately--

12 THE COURT:

13 What I don't want to do is have to go
14 through and cause again the Supreme Court to
15 go that extra, they are burdened enough. I
16 really think I'm going to let the ruling stay,
17 and let's do that. Follow your suggestion.
18 We'll not tamper with the stay order. We will
19 deny the petition. That way, if they say well,
20 I went beyond what they intended, so be it,
21 certainly all right. But if I did not rule,
22 and they say, "Well, we are waiting on a ruling
23 from the trial court." Then there would be a
24 further unduly delay. So, the ruling is that
25 the petition is denied.

26 MR. CREDO:

27 Does the Court wish to dictate its reasons
28 for the denial into the record?

29 THE COURT:

1 What I would like to do is--again, the
2 reasons are similar to what was reasoned earlier
3 in the written reasons for the denial. I am
4 as convinced as ever, in some areas even more
5 convinced, having heard the statements and
6 testimony of witnesses that what we had in this
7 case, which Mr. James Weidner of this Parish
8 defended Mr. Robert Sawyer, that we had a mature
9 and reasoned, and in some ways seasoned
10 certainly beyond his physical years, for the
11 defense of this gentleman.

12 Was the defense successful, of course, it
13 was not. I mean that is obvious. We wouldn't
14 be here today if it was successful. He would
15 be free somewhere in Tennessee, or somewhere
16 else.

17 Was it lacking? Someone once said, you
18 know, "Even Homer nods", which means that he
19 fell asleep one night and didn't complete a
20 paragraph, or a sentence, or left a dangling
21 participle. This is an imperfect world.

22 We had a man who is an acknowledged and
23 accepted expert saying, "I would have done this
24 differently, but there are exceptions in each
25 rule."

26 I am as convinced as ever, as I say in
27 some areas more convinced, maybe I did detect,
28 shall I call it a weakness in the defense that
29 I was not privy to, or aware of before, but on

balance, on balance I cannot imagine a better defense. Would it have been different? Of course, we all do things differently.

Mr. Weidner's testimony, for example, as to why he chose not to give that closing argument, it was reasoned and well reasoned out. The ^{here} question/is was the defense adequate? He said he was very familiar with the trial tactics of Mr. Boudousque. It has been alleged that certain law enforcement officers have good guy and bad guy type things. One guy strenuously interrogates, and when he leaves, the defendant, or the person being questioned, is breathless and afraid. Another officer comes in and says "Hi, how are you doing?" He says "How am I doing?" He says "That man just threatened to take my head off with his left foot." That is-- "You got to be joking, that is a mean thing to do. Tell me all about it."

Apparently, this was thought to be the tactic of Mr. Boudousque. "Hi, ladies and gentlemen, we're here today. We have five elements. I think I have got them all. Well, that is about it. Thank you so much." And then when the defense lawyer gets up and says this, this, and this, then he says, "This is preposterous, I can't stand the quiet no longer", and just thunder away. I'm just conjecturing because I have never been in a case with Mr.

Boudousque.

But my point is that these things were not done in a cavalier fashion, not done without some reasoning. In fact, it was charming in a good sense of that term, that Mr. Weidner stated, and I'm sure just a small amount of blushing, that he practices his speech in front of his bath room mirror. He had apparently, and this Court feels, a feeling of, how shall I say it, it's a dedication I guess is the term I am searching for, to this cause. He was espousing at the time, namely, the proper and best defense he could to Mr. Sawyer.

It's interesting, and I note this again, I guess it's a question of style. Mr. Beevers was so convinced that the man had little or no chance to succeed at a trial on the matter, that he sought additional help from a man more wise in his experience, by his own admission, he said "Go to the defendant and beg and plead with him", do this and this. And this is the best you can do.

Mr. Beevers apparently was so upset at this rejection that he chose to ask to have the Court allow him to withdraw from the case. I am sure that Mr. Weidner, had he been apprised of this, knowing of this, still having put his hands to the plow, kept along the furrow. He plowed as straight as he could.

1 I think the question is did he turn his
2 back and say "See you later." He hung with it
3 to the end. Was he successful, no. Was he
4 correct, who knows. Everybody has a different
5 style, in my opinion. But these are my rambling
6 reasons.

7 The man did not only the best he could, but
8 on reflection he did very good. I said in
9 earlier reasons if the Court would like me to
10 comment, the Supreme Court, on the five year
11 rule, I served in the legislature for ten years.
12 I know a little something about the legislative
13 intent of these matters. And it's my opinion,
14 I didn't draft, or was part of this particular
15 five year rule, but it's my opinion that it's
16 there as a floor. In other words, we have to
17 have some criteria, a minimum shall be to insure
18 that people out there are able to defend, or
19 function in this particular case properly; that
20 we say "You have to have been in business at
21 least five years."

22 When we find that in truth and in fact
23 someone meets specific criteria of ability and
24 knowledge and dedication and understanding,
25 then this artificial, if you will, floor, or
26 criteria must give way to reality.

27 It's my opinion, as I say, enough was here
28 shown to say there was effective counsel.
29 There was--all the other things that were to be

1 addressed have been addressed. And those are
2 my reasons for denying the petition.

3 Ms. COLE:

4 Your Honor, we will notify the Court of
5 our official intent to apply to the Supreme
6 Court.

7 THE COURT:

8 Thank you all.

9 (Discussion off the record.)

10 THE COURT:

11 As the Court appreciates it, there's been
12 an oral motion, rather an oral notice of appeal.
13 The Court would like that to be filed by
14 written notice, or motion, if you will, which,
15 of course, is granted.

16 The Court feels that sixty days should be
17 sufficient time. If it's not, certainly an
18 extension would be entertained. And if that
19 is the case, give sixty days for perfecting
20 the appeal.

21 Ms. COLE:

22 Sixty days from the physical filing of
23 the notice, or sixty days from today?

24 THE COURT:

25 Let's give--

26 MR. CREDO:

27 The court reporter has sixty days from
28 today to file the transcript.

29 (End of proceedings.)

C E R T I F I C A T E

I, Faye B. Cemo, Official Court Reporter,
do hereby certify that the foregoing transcript is true
and correct as taken by me in open Court at Gretna,
Louisiana, on Friday, July 12, 1985, before the Honorable
M. Joseph Tiemann, in the matter entitled STATE OF
LOUISIANA VERSUS ROBERT SAWYER, CRIMINAL DOCKET NO.
79-2841.

This the _____ day of _____

Faye B. Cemo

Faye B. Cemo
Official Court Reporter
Twenty-fourth Judicial District Court
In and For the Parish of Jefferson
State of Louisiana

ORIGINAL

NO. 89 - 5809

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

Supplemental Brief

PETITIONER'S BRIEF CONCERNING
INTERVENING AUTHORITY OF
HOPKINSON v. SHILLINGER

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Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

PETITIONER'S BRIEF CONCERNING INTERVENING AUTHORITY
OF HOPKINSON v. SHILLINGER

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT THAT IS NOW PRESENT IN THE CIRCUITS CONCERNING THE QUESTION WHETHER CALDWELL v. MISSISSIPPI IS RETROACTIVE UNDER THE STANDARDS OF PENRY v. LYNAUGH AND TEAGUE v. LANE.

There is now a conflict between the Tenth Circuit and the Fifth Circuit on the question whether Caldwell v. Mississippi, 472 U.S. 320 (1985), should be applied retroactively on the grounds that it involves a bedrock procedural element of fundamental fairness under Penry v. Lynagh, 109 S. Ct. 2934 (1989), and Teague v. Lane, 109 S. Ct. 1060 (1989). Robert Sawyer filed a petition for certiorari on October 16, 1989, seeking review of the question whether a majority of the Fifth Circuit En Banc Court was correct when it determined that Caldwell does not deserve retroactive application under the fundamental fairness standard of Penry and Teague. See Cert. Petition at i (Question Presented I(b)); Sawyer v. Butler, No. 87-3274 (5th Cir. Aug. 15, 1989) (en banc) (A-1-40 in Cert. Petition Appendix) (hereinafter C.P. App.). On October 24, 1989, the Tenth Circuit announced an En Banc decision where it unanimously rejected the position of the Fifth Circuit on this question, and held that Caldwell does qualify for retroactive application as a matter of fundamental fairness. See Hopkinson v. Shillinger, No. 86-2571 (10th Cir. Oct. 24, 1989) (en banc) at A-12-14, A-26-27. Thus, a new and compelling reason for this Court's review of Robert Sawyer's case

may be added to the reasons already described in his petition for certiorari. See Cert. Petition at 15-18; see also Supreme Court Rule 17.1.(a).

The Tenth Circuit's En Banc Hopkinson opinion reflects agreement with the reasoning of the five Fifth Circuit dissenters in Robert Sawyer's case regarding the "fundamental" nature of the Caldwell right. Compare Hopkinson, at A-12-14, with Sawyer, slip op. at 5554, 5564-5566 (A-37-39 in C.P. App.) (King, J. dissenting). Both opinions note that the Teague standard requires a bedrock procedural element to be one whose absence seriously diminishes the accuracy of a verdict, and that the Caldwell Court itself stressed that a death verdict is unreliable when a prosecutor misleads the jury about the finality of its decision. Compare Hopkinson, at A-13-14 ("the jury's understanding of its core function in a capital sentencing hearing [is] fundamentally related to the accuracy of a death sentence"), with Sawyer, slip op. at 5565 (A-38 in C.P. App.) (King, J., dissenting) ("to ignore the effect of Caldwell error on the reliability and accuracy of the sentence [is to] seriously [misapprehend] the nature of a Caldwell violation and the reasons behind the Court's decision to prohibit it").

In addition, the Tenth Circuit's Hopkinson reasoning reflects disagreement with the Fifth Circuit majority's general approach to identifying all bedrock procedural elements of fundamental fairness in death penalty cases. The Tenth Circuit maintains that the language of Teague itself is the proper guide for identifying bedrock elements, and relies on Teague's "seriously diminishes the accuracy of a verdict" test rather than the Fifth Circuit majority's "overwhelming influence upon accuracy" test. Compare Hopkinson, at A-12, A-13, with Sawyer, slip op. at 5553 (A-26 in C.P. App.). Likewise, the Tenth Circuit ignores the Fifth Circuit majority's argument that Teague's fundamental fairness exception should be defined by reference to the procedural default concept of a "fundamental miscarriage of justice." Compare Hopkinson, at A-12-14, with Sawyer, slip op. at 5552-5553 (A-25-26 in C.P. App.)

(relying on Dugger v. Adams, 109 S. Ct. 1211 (1989)). Thus, this Court's review of the conflict between Hopkinson and Sawyer is needed not only to resolve the specific question of Caldwell's retroactivity, but also to create guidelines concerning the proper analysis for defining bedrock procedural elements in all death penalty cases.

Finally, the Tenth Circuit's Hopkinson opinion demonstrates that Supreme Court review is needed in Sawyer because both the Fifth and the Tenth Circuits are uncertain about the proper methods for addressing the threshold question whether a rule is "new" under Penry and Teague. Two examples of the Tenth Circuit's analysis are illustrative.

First, like the Fifth Circuit majority in Robert Sawyer's case, the Tenth Circuit declines to follow this Court's blueprint in Penry for a Teague "new" law analysis. The Tenth Circuit does not examine the Eighth Amendment principles contained in the precedents cited in Caldwell, but relies instead on the Caldwell dissent in order to dismiss almost all of the relevant precedents with the observation that "Eighth Amendment jurisprudence of the Supreme Court prior to Caldwell did not visibly compel [sic] the outcome in Caldwell." Hopkinson, at A-9. See also id. at A-9-10 (ignoring the relevance of cases such as Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1978), and Gregg v. Georgia, 428 U.S. 153 (1976)); but see Sawyer, slip op. at 5558-5564 (A-31-37 in C.P. App.) (King, J., dissenting) (analyzing a variety of relevant federal and state precedents that demonstrate Caldwell's evolution from earlier Eighth Amendment principles). This Court's review of Robert Sawyer's case is needed in order to demonstrate to all courts whether it is more appropriate to extract "new" law characterizations from the actual Court opinions laying down particular rules, or from dissenting opinions objecting to those rules. The Fifth Circuit majority, like the Tenth Circuit, erred when it treated the Caldwell opinion as providing no support for the "old" Eighth Amendment law character of its holding. See Sawyer, slip op. at 5548-5550 (A-21-23 in C.P. App.);

Hopkinson, at A-6, A-9-10; Cert. Petition at i (Question Presented I(a)), 9-15.

A second example of lower court uncertainty about "new" law analysis under Penry and Teague is revealed in the disagreement between the Tenth and the Fifth Circuit concerning the relevance of "new" claim analysis in abuse of the writ and procedural default cases to the problem of "new" law analysis in retroactivity cases. The Fifth Circuit majority takes the position that it is irrelevant to retroactivity analysis whether a claim is "old" and foreseeable under abuse of the writ doctrine. See Sawyer, slip op. at 5550 (A-23 in C.P. App.) (Fifth Circuit ruling declaring Caldwell to be "old" claim provides no support for finding Caldwell to be "old" law under retroactivity doctrine). The Tenth Circuit takes the position that where a claim has been declared to be "new" for purposes of procedural default doctrine, this rule likewise must be held to be "new" law for retroactivity purposes. See Hopkinson, at A-6-9 (Tenth and Eleventh Circuit rulings declaring Caldwell to be "new" claim require a finding that Caldwell is "new" law under retroactivity doctrine). While it is unnecessary to resolve the question whether a Caldwell claim is "new" or "old" under abuse of the writ or procedural default doctrine in Robert Sawyer's case, Hopkinson demonstrates that it is important for this Court to establish further guidelines concerning the meaning of "new" law analysis under Penry and Teague, so that lower courts will take consistent approaches to this problem.

The direct conflict between the Fifth and Tenth Circuits concerning Caldwell's retroactivity should be resolved by granting review in Robert Sawyer's case. Without such review, Robert Sawyer and other Fifth Circuit death row inmates with meritorious Caldwell claims may be executed while similarly-situated defendants in the Tenth Circuit enjoy the benefits of receiving Caldwell relief. A national standard for Caldwell's retroactivity is needed to replace the conflict that now exists.

II. THERE IS NOW A CONFLICT IN THE CIRCUITS CONCERNING THE SUBSTANTIVE DEFINITION OF THE CALDWELL REMEDY, AND THIS COURT SHOULD REVIEW ROBERT SAWYER'S EIGHTH AMENDMENT CLAIM ON THE MERITS IN ORDER TO CLARIFY THE SCOPE OF CALDWELL RIGHTS.

The Hopkinson case creates a conflict between the Tenth Circuit and the Fifth Circuit concerning the method by which Caldwell violations are to be measured on the merits. The Tenth Circuit En Banc Court rejected, by a vote of six to four, the Fifth Circuit's view that Caldwell violations are inherently prejudicial to the reliability of a death verdict, and that the "fundamental fairness issue [of prejudice to the defendant] is subsumed in the threshold question of whether there was Caldwell error." Sawyer, slip op. at 5542 (A-15 in C.P. App.); see Hopkinson, at 16-22. According to Caldwell, constitutional error occurs when a prosecutor's argument: a) concerns the non-finality of the jury's decision; b) is false and misleading; c) is focused, unambiguous, and strong; and d) is uncorrected by the trial judge. See Caldwell, 472 U.S. at 320, 340 & n.7; see id. at 341, 342, 343 (O'Connor, J., concurring); see generally Sawyer, slip op. at 5538-5554 (A-11-17 in C.P. App.). According to the Tenth Circuit, however, a court also must determine a bad argument's actual effect on the jury, by examining such variables as the length of the hearing, the nature of the testimony, the number of aggravating and mitigating circumstances found to exist, and any boilerplate references to jury responsibility in the instructions. See Hopkinson, at A-21-25 (holding that a "two-step" prejudice analysis is required, so that once error is found, a court must inquire whether there is a "substantial possibility" that the argument actually affected the jury's death verdict).

This Court should review Robert Sawyer's Caldwell claim on the merits in order to confirm the correctness of the Fifth Circuit's position that no separate analysis of prejudice is required by this Court, once all the requirements for finding a Caldwell violation have been met. The Tenth Circuit's ruling finds no support either in the Caldwell opinion or in the Eleventh Circuit law upon which it relies. See Caldwell, 472 U.S. at 328-341 (where no "second step" inquiry

into the Hopkinson variables was conducted in analyzing the existence of constitutional error, and where reversal is required when it cannot be said that a violation had no effect on the jury); Mann v. Dugger, 844 F.2d 1446, 1457-1458 (11th Cir. 1988) (where no "second step" prejudice inquiry was conducted, and where the no effect test was employed for Caldwell violations). The Eleventh Circuit case used as a source for the Hopkinson holding is not a case involving a Caldwell violation as defined by this Court's standards. See Hopkinson, at 19-20, citing Tucker v. Kemp, 802 F.2d 1293, 1295-1297 (11th Cir. 1986) (en banc) (where a second step prejudice inquiry was conducted in a case not involving prosecutorial argument about the non-finality of a jury's verdict, under the standard for ordinary non-Caldwell misconduct established in Darden v. Wainwright, 477 U.S. 168 (1986) and Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). Currently the Fifth, Ninth and Eleventh Circuits all diverge from the Tenth Circuit's approach, and choose to follow the explicit analysis of the Caldwell opinion instead. See Sawyer, slip op. at 5542 (A-15 in C.P. App.) (citing cases from the Ninth and Eleventh Circuits, and pre-Hopkinson cases from the Tenth Circuit supporting the Fifth Circuit's approach); see also Hopkinson, at A-27-31 (Logan, J., dissenting) (advocating the Fifth Circuit's approach).

It is important to clarify the proper definition of a Caldwell violation by granting review of Robert Sawyer's case. While the Fifth Circuit did correctly reject the adoption of a Hopkinson-style second prejudice inquiry, it also included elements in its own merits standard that are not part of a proper definition of a Caldwell violation. See Cert. Petition at 20-21 (describing the Fifth Circuit majority's erroneous use of some factors rejected by this Court in Caldwell as immaterial to a Caldwell inquiry). Review of Robert Sawyer's Caldwell claim will allow this Court to provide clear guidance to all courts concerning the precise scope of the Caldwell remedy, as well as the status of Caldwell's retroactivity.

CONCLUSION

For the foregoing reasons, as well as the reasons described in the petition for certiorari, Robert Sawyer's petition for certiorari should be granted.

Respectfully submitted,

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November 14, 1989

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

CERTIFICATE OF SERVICE

I, Catherine Hancock, a member of the Bar of this Court, hereby certify that on this 14th day of November, 1989, a copy of the Petitioner's Brief Concerning Intervening Authority of Hopkinson v. Shillinger in the above-entitled case was mailed, first-class postage prepaid, to William J. Guste, Attorney General of Louisiana, State Capitol Station, P.O. Box 44005, Baton Rouge, Louisiana 70804, and to Ms. Dorothy Pendergast, Office of the District Attorney, 24th Judicial District Court, New Courthouse Building, Gretna, Louisiana 70054, counsel for the respondent herein. I further certify that all parties required to be served have been served.

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FILED
United States Court of Appeals
Tenth Circuit

OCT 24 1989

ROBERT L. HOECKER
Clerk

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK A. HOPKINSON,
Petitioner-Appellant,
v.
DUANE SHILLINGER, and the
ATTORNEY GENERAL OF THE STATE
OF WYOMING,
Respondents-Appellees.

No. 86-2571
(D. Wyoming)
(D.C. No. C85-0483)

ON REHEARING EN BANC

Daniel J. Sears, Denver, Colorado (Leonard D. Munker, Public Defender, and Norm Newlon, Assistant Public Defender, State of Wyoming, Cheyenne, Wyoming, with him on the briefs), for Petitioner-Appellant.

Terry L. Armitage, Assistant Attorney General (Joseph B. Meyer, Attorney General, John W. Renneisen, Deputy Attorney General, with him on the briefs), State of Wyoming, Cheyenne, Wyoming, for Respondents-Appellees.

Before HOLLOWAY, Chief Judge, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

ANDERSON, Circuit Judge.

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Mark A. Hopkinson was convicted in Wyoming State Court on four counts of first degree murder and two counts of conspiracy to commit first degree murder. The first three counts of murder arose out of his hiring Michael Hickey to bomb Vincent Vehar's home. That bombing killed Vehar, Vehar's wife, and one of his sons; another son was injured in the blast but survived. The fourth murder count was for procuring the killing of Jeff Green. Hopkinson was sentenced to life imprisonment for each of the Vehar murders, and to death for the murder of Green. See Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied, 455 U.S. 922 (1982) (Hopkinson I). Hopkinson was also convicted in the same trial of conspiracy with Harold James Taylor to commit the first degree murder of Vehar and conspiracy with Hickey to commit the first degree murder of William Roitz.

On appeal Hopkinson's death sentence for the murder of Green was vacated by the Wyoming Supreme Court. Id. A second sentencing proceeding was conducted and Hopkinson was again sentenced to death. The Wyoming Supreme Court affirmed that sentence. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908 (1983) (Hopkinson II). After subsequent unsuccessful challenges in state court¹ Hopkinson sought federal habeas relief with

¹ The Wyoming Supreme Court affirmed the denial of Hopkinson's motion for a new trial in Hopkinson v. State, 679 P.2d 1008 (Wyo.), cert. denied, 469 U.S. 873 (1984) (Hopkinson III). The denial of his first petition in state court for post-conviction relief and writ of habeas corpus was affirmed by the Wyoming Supreme Court in State ex rel. Hopkinson v. District Court, Teton County, 696 P.2d 54 (Wyo.), cert. denied, 474 U.S. 865 (1985) (Hopkinson IV). That court also upheld the denial of his motions for reduction of sentence and stay of execution in Hopkinson v. State, 704 P.2d 1323 (Wyo.), cert. denied, 474 U.S. 1026 (1985) [footnote continued . . .]

respect to his convictions for first degree murder and his sentence of death. His petition was summarily dismissed by the district court. Hopkinson v. Shillinger, 645 F. Supp. 374 (D. Wyo. 1986).

A panel of this court unanimously affirmed the district court on virtually all issues, and affirmed with one dissent on the subject matter of this en banc review. Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989), reh'g granted, March 23, 1989. The court thereafter agreed to consider en banc whether certain remarks by the prosecutor in the second sentencing proceeding violated the rule set out in Caldwell v. Mississippi, 472 U.S. 320 (1985), and, if so, the standard of review to be applied to such a violation, and whether applying that standard Hopkinson's death sentence must be vacated. The court also directed the parties to address whether Caldwell can be applied retroactively to this case. See Teague v. Lane, 109 S. Ct. 1060 (1989). On the latter question we conclude that Caldwell does apply. On the former, we hold that Hopkinson's death sentence was not imposed unconstitutionally.

I.

Because Caldwell was decided in 1985, two years after Hopkinson's second capital sentence became final, principles of

[. . . footnote continued]
(Hopkinson V). The denial of his second petition filed in state court for writ of habeas corpus was affirmed by the Wyoming Supreme Court in Hopkinson v. State, 708 P.2d 46 (Wyo. 1985) (Hopkinson VI). The denial of his request for discovery of grand jury testimony was affirmed in Hopkinson v. State, 709 P.2d 406 (Wyo. 1985) (Hopkinson VII).

nonretroactivity may apply to this collateral review. See Teague v. Lane, 109 S. Ct. 1060 (1989); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). However, we must decide first whether the issue is properly before us.

A.

The state has interposed no defense to the Caldwell issue on nonretroactivity grounds, thus raising a preliminary question of waiver. See opinions of Justices Brennan and Blackmun respectively accompanying and dissenting to remand in Zant v. Moore, 109 S. Ct. 1518 (1989); Penry v. Lynaugh, 109 S. Ct. at 2963 (Stevens, J., concurring and dissenting in part). We hold that the nonretroactivity defense is not waived, and should be considered.

Our analysis of retroactivity in this case is based upon and dictated by the "novel threshold test for federal review of state criminal convictions," announced in Teague. Teague v. Lane, 109 S. Ct. at 1084 (Brennan, J., dissenting). It was not previously available to the state. Arguably, the state could have raised the defense of nonretroactivity on other grounds, but they would have been largely irrelevant to the analysis required by Teague. Furthermore, the retroactivity approach adopted in Teague was not applied in the capital sentencing context until June of this year. Penry v. Lynaugh, 109 S. Ct. at 2944. Finally, and more fundamentally, we sua sponte raised the issue in this case because the very scope of the writ of habeas corpus, and therefore our

power to grant relief, is implicated. Cf. Teague v. Lane, 109 S. Ct. at 1069. Pursuant to our order, the parties have fully briefed the question.

B.

Under Teague, new rules cannot be applied in cases on collateral review, including capital cases, unless they fall into one of two exceptions. Teague v. Lane, 109 S. Ct. at 1073, 1075; Penry v. Lynaugh, 109 S. Ct. at 2944.

The initial question, therefore, is whether Caldwell erected a "new rule" when it declared that "[i]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. at 328-29.

In Penry the Supreme Court described "new rules" as follows:

"As we indicated in Teague, '[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.' [Teague v. Lane, 109 S. Ct. at 1070.] Or, '[t]o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.' Ibid. (emphasis in original). Teague noted that '[i]t is admittedly often difficult to determine when a case announces a new rule.' Ibid. Justice Harlan recognized 'the inevitable difficulties that will arise in attempting "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" [Mackey v. United States, 401 U.S. 667, 695 (1971)] (separate opinion of Harlan, J.) (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting))."

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Penry v. Lynaugh 109 S. Ct. at 2944.

Applying the "breaks new ground" description to the subject matter of Caldwell as a general proposition, the initial impulse is that it is not a novel constitutional idea that a jury should understand its role and responsibility in a capital sentencing proceeding. The majority opinion in Caldwell does not state that it is announcing a new rule. That opinion also points out, and Hopkinson reminds us, that state supreme courts have routinely considered it error for a prosecutor to mislead a jury into thinking that the ultimate determination of death rests with others. Caldwell v. Mississippi, 472 U.S. at 333-34. Appellant's Brief on Issue of Retroactivity at 7. Thus, Hopkinson reasons, a constitutional rule on the point would not break new ground and it would not impose a new obligation on the states. See Dugger v. Adams, 109 S. Ct. 1211, n.3 (1989).

However, we effectively reached a different conclusion in our recent decision in Dutton v. Brown, 812 F.2d 593, 596 (10th Cir.) (en banc), cert. denied, 108 S. Ct. 116 (1987). In Dutton, a Caldwell issue was raised for the first time in a federal habeas proceeding challenging a death sentence imposed in state court. Although failure to raise the issue in state court constituted a procedural default, we held that cause for the default existed on the ground that Caldwell announced a new rule. Our language in Dutton does not suggest that Caldwell was dictated by past precedent:

"We believe cause existed for the procedural default because trial counsel, at the time of trial in 1979, could not have known that the prosecutor's remarks might have raised constitutional questions. The law

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petitioner relies on did not become established until the Caldwell decision in 1985. We cannot expect trial counsel "to exercise extraordinary vision or to object to every aspect of the proceeding in the hope that some aspect might mask a latent constitutional claim." Engle v. Isaac, 456 U.S. 107, 113, 102 S.Ct. 1558, 1564, 71 L.Ed.2d 783 (1982). In Reed v. Ross, 468 U.S. 1, 17, 104 S.Ct. 2901, 2911, 82 L.Ed.2d 1 (1984), the Court ruled that cause exists for defense counsel's failure to raise an issue when a subsequent Supreme Court decision articulates a constitutional principle that had not been recognized previously. Consequently, the failure of counsel to raise a constitutional issue reasonably unknown to him satisfied the 'cause' requirement. Id. at 14, 104 S.Ct. at 2909."

Id. at 596 (emphasis added).

Echoing the notion that Caldwell was "new," the dissent to the panel opinion in this case comforted the trial court and the prosecution with regard to the alleged error by saying: "In fairness to the court and counsel, the sentencing proceeding was three years before Caldwell was decided. . . ." Hopkinson v. Shillinger, 866 F.2d at 1238 (Logan, J., dissenting).

We are not alone in the view expressed in Dutton that the novelty of Caldwell's Eighth Amendment application provided cause for a defendant's failure to raise the issue in state court prior to Caldwell. The Eleventh Circuit took the same position in Adams v. Dugger, 816 F.2d 1493, 1495-1501 (11th Cir. 1987), rev'd, Dugger v. Adams, 109 S. Ct. at 1211 (1989) (Caldwell claim prior to Caldwell was "so novel as to have no reasonable basis in existing precedent." Id. at 1500), and its initial opinion in that case, Adams v. Wainwright, 804 F.2d 1526, 1530-31 (11th Cir. 1986), rev'd, Dugger v. Adams, 109 S. Ct. at 1211 (1989), upon which we relied in Dutton.

The Supreme Court duly noted our position, along with those of the Eleventh and Fifth Circuits,² in its reversal of the Eleventh Circuit on other grounds. Dugger v. Adams, 109 S. Ct. at 1214, n.3. It declined to pass directly on the novel claim argument, holding that the defendant, Adams, was procedurally barred because he "plainly had the basis for an objection and an argument on appeal that the instructions violated state law." Id. at 1215 (emphasis added).

One way, perhaps, to reconcile Dutton with our holding here is to say that the analysis of a new rule for purposes of cause, at least as we saw it then,³ and analysis for determining a new rule for nonretroactivity purposes, are not identical. While the Supreme Court has left open the precise definition of cause, see Dugger v. Adams, 109 S. Ct. at 1215, it has stated that one way a petitioner can establish cause is by showing that "a constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1, 16 (1984). In Teague a new rule for nonretroactivity purposes is described as a result which is not "dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 109 S. Ct. at 1070 (emphasis in original). Comparing the

² The Fifth Circuit in Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985) (alternative holding), cert. denied, 476 U.S. 1176 (1986), concluded that "a competent attorney should have been aware of" this type of claim prior to Caldwell. But that position has since been explained and limited in Sawyer v. Butler, ___ F.2d ___, 1989 WL 90696 (5th Cir. Aug. 15, 1989) (en banc).

³ Harris v. Reed, 109 S. Ct. 1038 (1989); Dugger v. Adams, 109 S. Ct. at 1211; Teague v. Lane, 109 S. Ct. at 1060, and other very recent Supreme Court cases may have compelled a different analysis in Dutton.

two definitions, there is far more ground for congruence than for distinction. One might argue that a "reasonably available legal basis" is less demanding than a "dictated by precedent" test for nonretroactivity purposes. But even if that is so, a holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, must also mean that the claim was too novel to be dictated by past precedent. Thus, we cannot simply dismiss our Dutton dicta as irrelevant to the present question.

Reexamination of whether Caldwell broke new ground does not persuade us to a different view than that expressed in Dutton. As the Eighth Circuit explained in detail in Adams v. Dugger, 816 F.2d at 1495, 1498-1500, and the dissent pointed out in Caldwell, 472 U.S. at 347-52 (Rehnquist, J., dissenting), Eighth Amendment jurisprudence of the Supreme Court prior to Caldwell did not visibly compel the outcome in Caldwell. To the contrary, California v. Ramos, 463 U.S. 992 (1983), and Donnelly v. DeChristoforo, 416 U.S. 637 (1974), inclined in the opposite direction, and had to be specifically addressed and distinguished in Caldwell. The underpinning cited by the majority as justification for its holding in Caldwell was the "Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Caldwell, 472 U.S. at 340, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). A command of that generality may justify any result the Supreme Court wants to reach

in a particular case, but it does not adequately describe or compel a result in any specific matter.

Additionally, state court proscriptions of conduct similar to that involved in Caldwell did not necessarily establish prior to Caldwell that such conduct violated the Eighth Amendment. See Dugger v. Adams, 109 S. Ct. at 1216 ("We agree with respondent and the Court of Appeals that the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution."); Adams v. Dugger, 816 F.2d at 1499 n.6.⁴

Hopkinson points out that we have considered Caldwell claims in other cases without raising the issue of nonretroactivity. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), cert.

⁴ It is a necessary element of a subsequently available Caldwell claim that the challenged remarks or instructions were objectionable under state law. See Dugger v. Adams, 109 S. Ct. at 1217. Hopkinson's counsel alleged at oral argument that the challenged remarks violated the Wyoming constitution in the same way that it violated the United States constitution. Trans. of Oral Argument at 8, and that the reference to appellate review was improper because it did not inform the jury of the limitations of appellate review. Id. at 48. In that respect, the alleged error by omission, rather than commission, is similar to that asserted in Dugger v. Adams. Dugger v. Adams, 109 S. Ct. at 1214. As we have previously noted, defense counsel did not interpose an objection on those state law grounds. Failure to object on those grounds could have been cause for the Wyoming Supreme Court to apply a procedural bar later, thus providing a basis under Dugger v. Adams for foreclosing Hopkinson's Caldwell claim in this federal habeas proceeding. See id. However, the Wyoming Supreme Court expressly declined to apply a procedural bar on any ground with respect to Hopkinson's Caldwell claim, and addressed that claim on the merits. See Hopkinson v. State, 708 P.2d at 47. Thus the issue of procedural bar is not before us.

We do not intend to imply that the availability of a constitutional claim can never be suggested by state law. Quite the opposite might be true. Our conclusion in this case is confined to the constitutional claim in question.

granted on other grounds, 109 S. Ct. 1930 (1989); Dutton v. Brown, 812 F.2d 593 (10th Cir.) (en banc), cert. denied, 108 S. Ct. 116 (1987); Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986), cert. denied, 482 U.S. 909 (1987). However, those cases were decided prior to Teague, and in any event, no Caldwell violation was found. Cases in other circuits, cited by Hopkinson, where relief on the basis of Caldwell has been granted, were also decided prior to Teague. See, e.g., Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987); Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), reh'g granted, 828 F.2d 1498, on reh'g en banc, 844 F.2d 1446 (1988), cert. denied, 109 S. Ct. 1353 (1989); Adams v. Wainwright, 804 F.2d at 1526. While we acknowledge that a fortuity of timing placed previous habeas petitioners, here and elsewhere, in a different position than Hopkinson, nonretroactivity does not apply to Teague itself. The holding in Teague applies to new constitutional rules, Teague v. Lane, 109 S. Ct. at 1078, but the holding stems from an interpretation of the statutory scope of habeas corpus, and directly affects our power with respect to habeas petitions before us.

In summary, we hold, consistent with our opinion in Dutton v. Brown, that the rule in Caldwell falls within the "new rule" proscription of Teague, and, therefore, cannot be applied in this proceeding unless it falls within one of the two exceptions permitted by Teague.

C.

The first exception in Teague relates to rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendant because of their status or offense. Penry v. Lynaugh, 109 S. Ct. at 2952. That exception does not apply.

The second exception relates to rules which require the observance of "procedures that . . . are 'implicit in the concept of ordered liberty.'" Teague v. Lane, 109 S. Ct. at 1075, quoting Mackey v. United States, 401 U.S. at 693 (separate opinion of Harlan, J.) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). See Yates v. Aiken, 108 S. Ct. 534 (1988). But the scope of the second exception is limited by the plurality opinion in Teague "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague v. Lane, 109 S. Ct. at 1076-77. The procedures to which the plurality refers are bedrock procedures which are "central to an accurate determination of innocence or guilt." Id. at 1077. Presumably, the exception applies to the accuracy of the defendant's sentence as well, and to Eighth Amendment violations. Teague v. Lane, 109 S. Ct. at 1089 n.5 (Brennan, J., dissenting).

Emphasizing the narrowness of the second exception the Court stated, "[w]e believe it unlikely that many such components of basic due process have yet to emerge." Id. at 1077. The rule urged must be "the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" Id. Its absence must "undermine the fundamental fairness that

must underlie a conviction [or sentence] or seriously diminish the likelihood of obtaining an accurate conviction [or sentence]." Id.

Standing alone, a rule in capital hearings that no reference to appellate review can be made, or cannot be made without a full description of the appellate process, or that curative instructions must follow references to appellate review, do not amount to Eighth Amendment bedrock procedural elements. However, speaking in the abstract, and not as to the fact situation before us, it strikes us as bedrock procedure that a jury must understand that it, not an appellate court, carries the responsibility for imposing the death penalty.

We describe the matter in general terms because of uncertainty as to the scope of Caldwell itself. But we do regard the jury's understanding of its core function in a capital sentencing hearing to be fundamentally related to the accuracy of a death sentence. A jury's basic misunderstanding of its responsibility dislocates the purpose of the entire proceeding, thus implicating "the principal concern" of [Supreme Court] jurisprudence regarding the death penalty, the "procedure by which the State imposes the death sentence." Caldwell v. Mississippi, 472 U.S. at 340, quoting California v. Ramos, 463 U.S. at 999, and "the heightened need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305. Because of its fundamental nature a Caldwell claim is different, for example, from one arising under Booth v. Maryland, 482 U.S. 496 (1987), where a

prosecutor introduced victim impact evidence, or its extension in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), where evidence of the victim's religious and civic inclinations was deemed improper.

Accordingly, while we acknowledge Teague's severe constraints on the scope of collateral review, we conclude that Caldwell claims fall within the second exception in Teague, regardless of how the exception may finally be defined, and can be considered. We note that the Fifth Circuit takes a different view. See Sawyer v. Butler, ___ F.2d ___, 1989 WL 90696 (5th Cir. Aug. 15, 1989) (en banc).

II.

A.

The prosecutor's remarks which have placed the constitutionality of Hopkinson's death sentence in issue occurred during the prosecutor's summation to the jury in the second sentencing trial. The remarks to which Hopkinson assigns error in his en banc brief, together with the portions underscored in that brief, are as follows:

"Another matter, they talked about the possibility of error. There is no such thing as perfection. The system works to the best it can, but there are safeguards built in. That's due process. The Wyoming Supreme Court, as Mr. Munker said, reviewed the first trial. They found no error in the guilt phase. That went to the United States Supreme Court, and it was denied cert.

MR. SKAGGS: Objection, your Honor. There is flatly no evidence of that and if I can't bring in something there is no evidence of, he can't either.

MR. MORIARITY: Well --

THE COURT: Now, let me try and handle it. The jury has heard a lot of statements in closing arguments with reference to matters which technically there is no evidence on. And I won't talk about who said what, that's strictly up to you. But I have given everybody latitude and I'm not going to stop now. The jury will just sift it out.

MR. MORIARITY: Thank you, Your Honor. The testimony of Mrs. Barbara Oakley, the clerk of this court, when I asked her if the guilt phase had gone to the United States Supreme Court and had come back from them prior to this testimony, she said, yes, the record revealed that. That is the facts in this case. But the Wyoming Supreme Court sent it back because of error in the first trial on the death penalty as it pertained to the Jeff Green matter. The Wyoming Supreme Court will review whatever action you take in this case. It's an automatic review. So, the matter of error, the matter of mistake is not one for us to be concerned with here. Judge Ranck has done his best, his duty to instruct you on the law. We have given you the facts from the witness stand as best we can. You have to do your duty as best you can, and I'm sure you will. But, because of some possibility of error, they say don't give him the death penalty. That's not what the law is. It's nowhere in your instructions from the Court. [Emphasis added.] Transcript of May 17, 1982 proceedings, Vol. XVI, pp. 1246-48."

Supplemental Reply Brief for Petitioner-Appellant on Rehearing En Banc at 7-8 (emphasis in original).

Notwithstanding the fact that the challenged statement by the prosecutor did not misstate (although it did not fully explain) Wyoming law, see Dugger v. Adams, 109 S. Ct. at 1214, Trans. of Oral Argument on Rehearing En Banc at 48, the court is equally divided as to whether the prosecutor's statement, taken in context, violated the rule in Caldwell. That is, the court cannot agree whether or not the prosecutor's statements were of the type which, when taken in context, "tend[ed] to shift the responsibility for the sentencing decision away from the jury."

Parks v. Brown, 860 F.2d 1545, 1549 (10th Cir. 1988) (en banc), cert. granted, 109 S. Ct. 1930 (1989). The essentials of the opposing viewpoints on this subject are set out in the panel opinion and dissent, and it is unproductive to repeat and enlarge upon those arguments here because of the equal division of the court on the subject.

Our equal division has the effect of affirming the district court's denial of Hopkinson's petition on the Caldwell issue. While we could end our consideration of the case at this point, we choose not to do so. In order to make our views clear with respect to the proper test to be applied to Caldwell issues, and because further analysis does yield a decision in this case, we proceed with our analysis on the assumption that uncorrected Caldwell-type remarks were in fact made by the prosecutor.

B.

Assuming arguendo that the prosecutor's statements were of the type which would violate the rule in Caldwell, the dispositive legal issue concerns the standard of review by which the prosecutor's remarks must be evaluated. In substance, the issue is whether Hopkinson's death sentence must be vacated because of the prosecutor's statement even if there is no substantial possibility that the remarks affected the jury's decision.

Hopkinson argues that by the following language in Caldwell the Supreme Court erected a "no effect" standard of review for Caldwell violations:

"In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriate-

ness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."

Caldwell v. Mississippi, 472 U.S. at 341 (emphasis added). Since it would be impossible for a reviewing court to say that a remark which violates the rule in Caldwell had no conceivable effect on a sentencing decision, however insignificant, Hopkinson acknowledges that as a practical matter the "no effect" standard amounts to a per se rule requiring reversal. Trans. of Oral Argument on Rehearing En Banc at 19-22.

We are not persuaded that the Supreme Court has erected a standard of review on this subject so formidable as to foreclose appellate review beyond a bare determination that an uncorrected remark falling within the Caldwell category has been uttered.

The opinion in Caldwell does not state that it is formulating a standard of review. It is in fact equivocal on the subject. In the paragraph preceding the one containing the "no effect on the sentencing decision" language, the Court employs a fundamental fairness standard: "Such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." Caldwell v. Mississippi, 472 U.S. at 340 (emphasis added). The concurring and dissenting opinions evidence no recognition that a "no effect" or per se reversal standard had been installed by the majority. Justice O'Connor, concurring in part and concurring in the judgment, uses "unacceptable risk." Id. at 343 (O'Connor, J.) The dissenting justices refer to "whether the statements rendered the proceedings

as a whole fundamentally unfair." Id. at 350 (Rehnquist, J., dissenting).

"No effect" language has been used by the Supreme Court in two other cases without suggesting its use as a per se standard of reversal. In Skipper v. South Carolina, 476 U.S. 1, 8 (1986), the Court stated: "Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations." (emphasis added). However, it followed that comment by saying: "Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." Id. (emphasis added). In her concurring opinion in Franklin v. Lynaugh, 108 S. Ct. 2320, 2334 (1988) (O'Connor, J., concurring), Justice O'Connor, joined by Justice Blackmun, identified the controlling standard in Skipper as "reasonably likely."

In Hitchcock v. Dugger, 481 U.S. 393, 399 (1987), the Court used "no effect" language but did so in connection with and as an alternative to harmless error: "Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge."

Other opinions of the Supreme Court, dealing with Eighth Amendment issues, including concurring and dissenting opinions, have relied on standards which permit the exercise of some degree

of judgment on appellate review. See Gregg v. Georgia, 428 U.S. 153, 188, 203 (1976) (plurality opinion) ("substantial risk" standard for testing the constitutionality of death sentencing procedures); Wainwright v. Goode, 464 U.S. 78, 86 (1983) ("degree" to which the process of balancing aggravating and mitigating factors was "infected" by a particular statutory provision); Turner v. Murray, 476 U.S. 28, 33 (1986) ("constitutionally significant likelihood," or whether the circumstances "created an unacceptable risk"); McCleskey v. Kemp, 107 S. Ct. 1756, 1783 (1987) (Justices Brennan, Marshall, Blackmun and Stevens dissenting) ("substantial risk" and "significant probability" standards invoked); Franklin v. Lynaugh, 108 S. Ct. at 2338 (Stevens, J., dissenting) ("substantial risk" standard); and Mills v. Maryland, 108 S. Ct. 1860, 1867 (1988) ("substantial possibility," and "[t]he possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing."). Id. at 1870 (emphasis added). We note also that in Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court expressly rejected a no possible effect standard in a case where the jury was instructed on both invalid and valid aggravating circumstances, stating: "More importantly, for the reasons discussed above, any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process." Id. at 889 (emphasis added) (footnote omitted).

The two circuits which have had occasion to address the appropriate standard for a Caldwell claim have reached different conclusions regarding the appropriate standard. In Tucker v.

Kemp, 802 F.2d 1293, 1295-96 (11th Cir. 1986) (en banc), cert. denied, 480 U.S. 911 (1987), the Eleventh Circuit used a fundamental fairness approach derived from the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). It reviewed the challenged incident to determine whether there was "'a reasonable probability that, in the absence of the offending remarks, the sentencing outcome would have been different' A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Tucker v. Kemp, 802 F.2d at 1295-96 (quoting Tucker v. Kemp, 762 F.2d 1480, 1483-84 (11th Cir. 1985) (en banc)). In Sawyer v. Butler, ___ F.2d ___, 1989 WL 90696 (5th Cir. Aug. 15, 1989) (en banc), the Fifth Circuit adopted a "no effect" test. It did so, however, in the context of a one-step analytical framework for determining the existence of actual Caldwell error:

"As we shall see, the effect upon a death sentence of Caldwell error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of Caldwell error. Much of the argument here is over the ingredients of the prohibition."

Id. slip op. at 11. Our two-step approach⁵ may cast the use of

⁵ In our recent en banc decision in Parks v. Brown, we describe a two-step process for evaluating a Caldwell issue:

"A two-step inquiry is appropriate when examining alleged Caldwell violations. See Darden v. Wainwright, 477 U.S. 168, 184 n.15, 106 S.Ct. 2464, 2473 n.15, 91 L.Ed.2d 144 (1986). First, the court should determine whether the challenged prosecutorial remarks are the type of statements covered by Caldwell. In other words, they must be statements that tend to shift the [footnote continued . . .]

the governing standard into a different role. However, to the extent the Fifth Circuit's standard for evaluating the impact of Caldwell-type remarks on the sentencing decision differs from that which we adopt here, we respectfully disagree.

In our en banc decision in Parks v. Brown, 860 F.2d at 1557, this court adopted the Mills v. Maryland "substantial possibility" standard in a California v. Brown⁶ issue relating to the impact on a jury of an instruction cautioning against sympathy. No different standard should be required here.

Of course, distinctions can be drawn between "Caldwell" and "Brown" issues. In the former, instructions or arguments which successfully diminish the jury's sense of its responsibility infect the entire deliberation process. In the latter, only the jury's consideration of mitigating evidence is involved. But the latter more typically involves instructions from the court, and the influence of instructions on the jury (as opposed to remarks from counsel) arguably presents a more serious situation. More to the point, however, the focus in each instance is upon the reliability of the product of the jury's deliberation. In our view the proper standard for evaluating the Caldwell issue in this case, if a violation exists, is whether there is a substantial

[. . . footnote continued]
responsibility for the sentencing decision away from the jury. If so, the second inquiry is to evaluate the effect of such statements on the jury to determine whether the statements rendered the sentencing decision unconstitutional."

Parks v. Brown, 860 F.2d at 1549.

⁶ California v. Brown, 479 U.S. 538 (1987).

possibility that the prosecutor's statements, taken in context, affected the sentencing decision.

III.

Applying the "substantial possibility" standard of review we have no difficulty holding that the remarks in question, assuming they fell within the category of remarks covered by Caldwell, did not unconstitutionally affect the sentencing decision.

The sentencing hearing in this case spanned a ten-day period and filled 1,270 pages of transcript. In addition to multiple exhibits, including those from the guilt phase of the trial, the state presented testimony from fifteen witnesses by transcript or in person, and the defense presented eight. The facts of this case are set out at length in the panel opinion and in the decisions of the Wyoming Supreme Court. The sentencing jury heard the essentials of that evidence, as well as other testimony which the guilt phase jury did not hear. We do not undertake to replicate the evidence here. Hopkinson's counsel vigorously attacked the credibility of key witnesses and the accuracy and reliability of key points of evidence. However, the state's evidence relating to the aggravating and mitigating factors in the case overwhelmingly established Hopkinson's capacity to be an intimidating, violent, manipulative individual. His full responsibility for procuring the bombing murder of the Vehar family, and the torture murder of Jeff Green was before the jury.

The jury was told repeatedly about its duties, the gravity of its role, and that the remarks of counsel were not to be

considered as evidence or legal instruction in the case. R. Vol. IX-A at 4, 17, 33, 35, 36, 63, 65, 72-74, 81; R. Vol. IX-F at 1164, 1169, 1200, 1202-04, 1207, 1212-13, 1237-38, 1242, 1244, 1252. The court formally instructed the jury members in no uncertain terms that they bore the full responsibility and were the final decision-makers on the death penalty:

"You should not act hastily or without due regard for the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence and all of it and bring to bear your best judgment upon the sole issue which is submitted to you at this time: Whether the defendant shall be sentenced to death or to life imprisonment.

Your decision as to the sentence to be imposed is mandatory. You are not merely recommending a sentence to the Judge. You are the final decision-makers as to whether Mark Hopkinson will be sentenced to life in prison or to death."

R. Vol. VI-H at 699 (emphasis added). A written copy of those instructions was given to each juror to take into the jury room for assistance in their deliberations. R. Vol. IX-F at 1162.

In its decision the jury separately found that every one of the five aggravating circumstances posed to the jury were proved, beyond a reasonable doubt, that none of seven statutory mitigating circumstances were present, and of the two additional mitigating circumstances, one was present and one was not.⁷ On those

⁷ The jury found as follows:

"THE CLERK: Findings and recommendation of sentence. We, the jury, empaneled and sworn in the above-entitled case, do, upon our oaths, find as follows:

Part I: Aggravating Circumstances.

1. The murder was committed by a person under [footnote continued . . .]

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separate, strong findings the jury recommended the death sentence.

After a thorough review of the record we are convinced that there is no substantial possibility that the comment by the

[. . . footnote continued]
sentence of imprisonment. Yes.

2. The defendant was previously convicted of another murder in the first degree. Yes.

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest. Yes.

4. The murder was committed for pecuniary gain. Yes.

5. The murder was especially heinous, atrocious or cruel. Yes.

Part II: Mitigating Circumstances.

1. The defendant has no significant history of prior criminal activity. No.

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. No.

3. The victim was a participant in the defendant's conduct or consented to the act. No.

4. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. No.

5. The defendant acted under extreme duress or under the substantial domination of another person. No.

6. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. No.

7. The age of the defendant at the time of the crime. No.

8. Any other mitigating circumstances.

8. The torture of Jeff Green may not have been ordered by Mark Hopkinson. No.

[footnote continued . . .]

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prosecutor unconstitutionally affected the decision of the jury. We reach the same conclusion if we apply a fundamental fairness standard. That is, the challenged comments did not render the sentencing proceeding and death sentence fundamentally unfair on the facts of this case.

IV.

CONCLUSION

We have considered all of the arguments of counsel. Because we hold that Hopkinson's death sentence was not imposed unconstitutionally, we affirm the district court's denial of the writ of habeas corpus on this issue.

AFFIRMED.

[. . . footnote continued]

9. Actions of Mark Hopkinson helped save the life of a prison guard. Yes.

Part III. Recommendation. That sufficient mitigating circumstances do not exist to outweigh the aggravating circumstances found to exist and the jury recommends that the defendant be sentenced to death."

R. Vol. IX-F at 1264-65.

No. 86-2571, HOPKINSON v. SHILLINGER

LOGAN, Circuit Judge, with whom Chief Judge Holloway and Judges McKay and Seymour, join, dissenting:

I agree with the majority opinion that we have a "new" rule within the contemplation of Teague v. Lane, 109 S. Ct. 1060 (1989), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989). I would add, because I differ with the majority on the standard of review contemplated by Caldwell v. Mississippi, 472 U.S. 320, 341 (1985), that it is Caldwell's "greatly heightened intolerance of misleading jury argument," Sawyer v. Butler, 881 F.2d 1273, 1291 (5th Cir. 1989) (en banc), which clearly makes it a new rule.

Donnelly v. DeChristoforo, 416 U.S. 637 (1974), had been settled law for over ten years before Caldwell was decided. Donnelly held that due process does not require the reversal of a conviction based on alleged improper remarks of the prosecutor unless the remarks constituted fundamental unfairness to the defendant. Thus, if Caldwell applied that or a significantly similar standard (even in the context of an Eighth Amendment challenge), it would be difficult to say that Caldwell was not dictated by Donnelly precedent. Cases dictated by precedent cannot espouse "new" rules under Teague. 109 S. Ct. at 1070. Thus, it is the standard of review articulated in Caldwell that makes it "new," under the Teague analysis.

I also agree with the majority that Caldwell error falls within the second exception of Teague and Penry. The jury's perception of its position in the criminal justice system, when it

has discretionary power to put a defendant to death, is central to the reliability of the sentence--hence it is a procedure "implicit in the concept of ordered liberty." Teague, 109 S. Ct. at 1075. The majority's analysis on this issue is better than that of the Sawyer majority which found to the contrary. 881 F.2d at 1292-94.

We are equally divided on the issue whether there is Caldwell error in the case at bar. I remain persuaded that the prosecutor's remarks in the rebuttal part of his closing argument immediately before the case was submitted to the jury constituted Caldwell error. I can add little to my analysis in my dissent to the panel opinion, Hopkinson v. Shillinger, 866 F.2d 1185, 1233-37 (10th Cir. 1989), and do not repeat it here.

Where I differ from the majority is on the standard of review that we must apply to Caldwell error. The Supreme Court concluded in Caldwell, "[b]ecause we cannot say that this effort [prosecutor's improper argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341 (emphasis added). The majority here says essentially that the Supreme Court did not mean what it said in Caldwell, and did not intend to create such a tough standard of review. The majority equates a "no effect" standard with a per se reversal rule and then discusses a number of cases it considers analagous in which the Supreme Court used different words to describe the review standards in those situations.

I do not agree that the Supreme Court inadvertently used the "no effect" words or intended something different than the high standard of review indicated by those words. The writer of the majority opinion in Caldwell, in dissenting to a denial of certiorari in Moore v. Blackburn, 476 U.S. 1176 (1986) (denying cert. to 774 F.2d 97 (5th Cir. 1985)), stated that under the court's recent Caldwell decision the petitioner's sentence could not stand unless the error "had no effect on the sentencing decision." 476 U.S. at 1176 (Marshall, J., dissenting). The dissenters in Caldwell itself were fully aware that a "no effect" standard was being articulated in the majority opinion. Justice Rehnquist, writing for the dissenters, objected to two facets of the majority opinion: (1) the majority's conclusions about the misleading effect of the prosecutor's statements, taken in context, and (2) the imposition of the "no effect" test (what the dissent saw as the exaggeration of the likelihood of actual prejudice). In speaking to the second objection, the dissent criticized the majority's failure to apply the "fundamental fairness" test of Donnelly. The dissent further clarified its disagreement with the majority stating, "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is ipso facto constitutionally unreliable." Caldwell, 472 U.S. at 350-51 (Rehnquist, J., dissenting).¹

¹ The majority in the case at bar suggests that although Skipper v. South Carolina, 476 U.S. 1, 8 (1986), uses the "no effect" Continued to next page

I believe the Supreme Court's recent decision in Darden v. Wainwright, 477 U.S. 168 (1986), recognized and reinforced the "no effect" standard as applied to Caldwell error in the sentencing phase of a capital murder trial. Darden, which involved prosecutor's comments during the guilt phase, distinguished Caldwell, stating:

"The principles of Caldwell are not applicable to this case. Caldwell involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. . . .

. . . In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. . . . Caldwell is relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process."

477 U.S. at 183 n.15 (emphasis added).

All fourteen of the active judges in the Fifth Circuit agree that the Supreme Court, in Caldwell, intended to adopt a "no effect" test. In the Sawyer opinion on en banc rehearing, that court extensively analyzes why Caldwell sets out such a high

Continued from previous page
language it also does not adopt that as a standard. It does use other language including "under any standard." But I believe it adopts a "no effect" standard of review for errors in the admission of mitigating evidence in a death sentencing proceeding by stating, in the crucial paragraph of the opinion: "Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect on the jury's deliberations." Id. at 8 (emphasis added).

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standard, when the Supreme Court considers the fundamental fairness standard sufficient to protect the defendant's rights in other situations. After that analysis the Sawyer court concludes:

"The state cannot resist the conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. .

. . . .

[Caldwell] instructs that if the State seeks 'to minimize the jury's sense of responsibility for determining the appropriateness of death' and 'we cannot say that this effort had no effect on the sentencing decision,' then 'that decision does not meet the standard of reliability that the Eighth Amendment requires.' . . .

In sum, we reject [the State's] proffered definition of Caldwell. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation."

Sawyer, 881 F.2d at 1285-86 (quoting Caldwell, 477 U.S. at 341).

The "substantial possibility" test the majority in the instant case adopts smacks too much of preponderance-of-the-evidence.² While I said in my dissent to the panel opinion that

² Additionally, it seems to me that the issue of the likelihood of the prosecutor's remarks actually having affected the sentencing decision is largely subsumed in the initial determination of whether Caldwell error has, in fact, occurred. A close evaluation of the entirety of the prosecutor's argument and the statements and instructions of the trial judge are necessary to determine whether the prosecutor's remarks, taken in context, would tend to provide the jury with a misleading perception of its role. When viewed in this light, it becomes apparent that many objections to the no effect standard (including those of the Caldwell dissent) are actually better analyzed as objections to finding the presence of Caldwell error at all.

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the "no effect" test approaches a per se rule of reversal, I did not mean that it is a per se reversal rule. Rather the test seems to be akin to a beyond-a-reasonable-doubt standard.

In Caldwell, the Court did not require the petitioner to prove actual prejudice; indeed, the limitations of the appellate process and the rules against polling jurors would effectively preclude any such proof. Rather, Caldwell evaluated, in the context of the prosecutor's argument and the court's instructions to the jury, the inherent tendency of the improper remarks "to minimize the jury's sense of responsibility for determining the appropriateness of death." 472 U.S. at 341. When that Court said that violations can be overlooked only if a reviewing court can conclude with confidence that they had "no effect on the sentencing decision," id., it meant, I believe, that reviewing judges should ask themselves if they are convinced beyond reasonable doubt, considering the context, admonitions of the trial judge and other circumstances, that the improper remarks did not affect the sentencing decision.

If I ask myself whether there is a "substantial possibility" the prosecutor's Caldwell remarks affected the jury's decision to sentence Hopkinson to death I must say no--they probably did not affect the jury's decision. But if I ask myself whether I am so convinced beyond a reasonable doubt my answer is not the same. I cannot say with confidence that the prosecutor's remarks had no effect on the jury's sentencing decision. Therefore, I would hold that Hopkinson's death sentence was imposed in violation of the Eighth Amendment and must be vacated.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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2/1/90

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

In his Petition for Certiorari, Robert Sawyer sought this Court's review of his case on the grounds that the Fifth Circuit En Banc majority's ruling below presents two substantial and unresolved questions: Whether the rule of Caldwell v. Mississippi is retroactive, either because it is not a "new" rule under Teague v. Lane and Penry v. Lynaugh, or because it involves a "bedrock" procedure that falls within Teague's fundamental fairness category of retroactive "new" rules. Caldwell, 472 U.S. 320 (1985); Teague, 109 S. Ct. 1060 (1989); Penry, 109 S. Ct. 2934 (1989). After the Tenth Circuit ruled unanimously En Banc that Caldwell falls within Teague's fundamental fairness category, Robert Sawyer filed a supplemental brief seeking this Court's review on the additional ground that the Fifth Circuit majority's ruling denying Caldwell retroactive effect is now in conflict with the Tenth Circuit's ruling granting retroactive effect. Compare Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc) with Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc).

The State has two chief responses to Robert Sawyer's claims concerning the need for this Court's review of his case, and both responses are based on incorrect readings of precedents in the lower courts. First, the State argues that the Fifth, Tenth and Eleventh

Circuits are in agreement that Caldwell is a "new" rule under Teague, when the Eleventh Circuit has never so held, and when both the Eleventh and the Sixth Circuits continue to entertain retroactive Caldwell claims on the merits in the post-Teague era. Second, the State argues that despite the explicit conflict between the Fifth Circuit and the Tenth Circuit concerning Caldwell's retroactivity, this Court's review is unnecessary because the defendants in both circuits lost, albeit for different reasons. This argument relies on the notion that defendants who are barred from Caldwell litigation in the Fifth Circuit are treated the same way as defendants in the Tenth and Eleventh Circuits who may litigate retroactively-animated Caldwell claims. In fact, Tenth and Eleventh Circuit precedents demonstrate that this claim of similar treatment is mistaken.

I. THIS COURT'S REVIEW OF THE QUESTION WHETHER CALDWELL v. MISSISSIPPI IS A "NEW" RULE UNDER TEAGUE v. LANE IS NEEDED BECAUSE THE FIFTH AND TENTH CIRCUITS ARE IN CONFLICT ON THE QUESTION WHETHER PROCEDURAL DEFAULT "NOVEL CLAIM" DOCTRINE SHOULD BE TREATED AS DETERMINATIVE FOR TEAGUE'S "NEW" LAW ANALYSIS. REVIEW IS ALSO NEEDED BECAUSE THE SIXTH AND ELEVENTH CIRCUITS CONTINUE TO TREAT CALDWELL AS AN "OLD" RULE WHILE THE FIFTH AND TENTH CIRCUITS VIEW CALDWELL AS A "NEW" RULE UNDER TEAGUE.

There are four reasons why the State is wrong to argue that this Court's review of Robert Sawyer's case is "not necessary" because "there is no conflict among the circuits at this time" on the question whether Caldwell v. Mississippi is a "new" rule under Teague v. Lane's retroactivity doctrine. Brief in Opposition at 7. Caldwell, 472 U.S. 320 (1985); Teague, 109 S. Ct. 1060 (1989). First, the State is wrong to claim that the Eleventh Circuit has "resolved the issue of whether a Caldwell claim is a 'new rule' of law under Teague," because the Eleventh Circuit has not yet addressed this issue. Id. In pre-Teague cases, the Eleventh Circuit decided that Caldwell provided cause for procedural default under the "novel claim" excuse for "cause" for default outlined in Reed v. Ross, 468 U.S. 1, 15-16 (1984). See Brief in Opp., citing Eleventh Circuit cases at 6. However, neither the Eleventh Circuit nor this Court has held that Reed

analysis is a substitute for Teague analysis, or that procedural default "novel claim" doctrine creates precedent for non-retroactivity judgments. Indeed, this Court left open the question whether and how Teague analysis relates to "new claim" analysis in abuse of the writ doctrine, in remanding Zant v. Moore last year to the Eleventh Circuit, with instructions to consider its "new claim" holdings "in light of Teague v. Lane." Zant v. Moore, 109 S. Ct. 1518 (1989). See Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (refraining from ruling on the Teague issue, and holding that abuse of the writ occurred with respect to claims not raised in first habeas petition).

Second, the State is wrong to argue that review is unnecessary because "no conflict" exists among the circuits concerning the status of Caldwell under Teague, because the Fifth and the Tenth Circuits are in conflict concerning the proper use of procedural default (or abuse of the writ) "novel claim" precedents in analyzing Caldwell's potential novelty under Teague. In Robert Sawyer's case, the Fifth Circuit majority found that "novel claim" precedents are not relevant to Teague analysis because "the meaning of 'newness' differs in writ abuse cases from its meaning in Teague cases." Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), slip op. at 5550 (Cert. Petition Appendix at A-23). By contrast, the Tenth Circuit found that procedural default "novel claim" precedents are determinative in retroactivity decisions. See Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc) (Petitioner's Intervening Authority Brief Appendix at A-9) ("a holding that a claim is . . . novel . . . thus establishing cause . . . must also mean that the claim was too novel [to be retroactive]").

Only this Court can resolve the important question whether pre-Teague circuit holdings that opened the doors for death row defendants to litigate "novel claims" may, in the post-Teague world, be used against defendants as proof of the non-retroactivity of the rulings whose benefits they seek to enjoy. Robert Sawyer anticipated the Caldwell ruling by raising his Caldwell claim, without procedural default, in state court before Caldwell was decided. This

Court should consider whether defendants in Robert Sawyer's situation must be barred from litigating their claims because defendants in other circuits were allowed, in the pre-Teague world, to bring Caldwell claims despite their own procedural defaults and failures to anticipate the Caldwell decision.

Third, the State is wrong to argue that this Court's review is unnecessary because there is "no conflict" in the circuits concerning the potential "new" law status of Caldwell under Teague, because the Sixth and the Eleventh Circuits are entertaining Caldwell claims on the merits, and implicitly treating Caldwell as "old" law under Teague, while the Fifth and the Tenth Circuits in Sawyer and Hopkinson found that Caldwell is "new" law under Teague. See, e.g., Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989) (denying Caldwell relief on the merits); Stano v. Dugger, 883 F.2d 900 (11th Cir. 1989) (denying Caldwell relief on the merits); see also Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989) (granting Caldwell relief on the merits). Robert Sawyer's case should be reviewed by this Court in order to insure that all death row defendants who seek Caldwell's retroactive application are treated alike in the post-Teague era.

Finally, the State's argument that review is unnecessary fails to take into account the central argument in Robert Sawyer's Petition for Certiorari, which is that the Fifth Circuit majority's "new" rule holding raises substantial and unresolved questions concerning the proper interpretation of Teague and Penry v. Lynaugh. Penry, 109 S. Ct. 2934 (1989). See Cert. Petition at 9-13. The State concedes that the Fifth and Tenth Circuits use different rationales for their "new" rule holdings. Brief in Opp. at 9. There is a substantial question presented here whether either one of these rationales is correct, considering the authorities that support the argument that Caldwell is an "old" segment of evolving Eighth Amendment law. See cases cited in excerpts from Robert Sawyer's Fifth Circuit Briefs, Appendix A-1-9. Given the different approaches to Teague analysis illustrated by the opinions in Sawyer and Hopkinson, it is clear that this Court's review of Robert Sawyer's case is necessary in order to provide

immediate guidance to lower courts concerning the proper application of the standards for "new" rule analysis set forth in Teague and Penry. Compare Coleman v. Saffle, No. 89-5737, cert. petition filed Oct. 2, 1989 (seeking review of Tenth Circuit holding that Booth v. Maryland, 482 U.S. 496 (1987) is a "new" rule under Teague).

II. THIS COURT'S REVIEW OF THE QUESTION WHETHER CALDWELL IS RETROACTIVE UNDER TEAGUE'S FUNDAMENTAL FAIRNESS EXCEPTION IS NEEDED BECAUSE ALL FIFTH CIRCUIT DEATH ROW DEFENDANTS ARE BARRED FROM CLAIMING THE RETROACTIVE BENEFITS OF CALDWELL, WHILE DEFENDANTS IN OTHER CIRCUITS CONTINUE TO ENJOY THE BENEFIT OF LITIGATING RETROACTIVE CALDWELL CLAIMS UNDER VARYING "MERITS" FORMULAS.

The State concedes that the Fifth and Tenth Circuits are now in conflict concerning the question whether Caldwell should be given retroactive effect as a rule that falls within the fundamental fairness exception of Teague. Brief in Opp. at 8. But the State argues that the conflict involves "a difference in analysis as opposed to a difference in results." Id. at 9. The State further claims that "the outcome for similarly situated defendants [seeking the retroactive benefits of Caldwell] would be the same" in the Fifth, Tenth, and Eleventh Circuits. Id. at 10. Precedents in these three circuits do not support this assertion.

First, a death row defendant in the Fifth Circuit is now barred from seeking the retroactive benefit of Caldwell, and may argue only that the prosecutor's false and misleading statements "so infected the trial with unfairness" as to deny due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)); see Sawyer, slip op. at 5553-5554 (Cert. Pet. App. at A-26-27). The same defendant in the Tenth Circuit is free to litigate a retroactive Caldwell claim, but must prove that the prosecutor's statements were so false and misleading as to create a "substantial possibility" of an effect on the verdict. Hopkinson, Pet. Int. Auth. Brief App. at A-21 (adopting the standard from Mills v. Maryland, 108 S. Ct. 1860 (1988), in lieu of Caldwell's "no effect" test). The

same defendant in the Eleventh Circuit is not only free to litigate a retroactive Caldwell claim, but is also entitled to relief under the standards specified in the Caldwell opinion itself, so that when a false and misleading prosecutorial statement about the non-finality of a jury's death verdict is made, and is not adequately "corrected" by the trial judge or the prosecutor, an effect on the jury is presumed to exist. See Mann v. Dugger, 844 F.2d 1446, 1456 (11th Cir. 1988) (not requiring proof of "effect" on the jury); see also Stano v. Dugger, 883 F.2d 900 (11th Cir. 1989) (allowing litigation of a retroactive Caldwell claim).

This proliferation of retroactivity and merits-analysis standards for Caldwell only illustrates the necessity for Supreme Court review in Robert Sawyer's case. The conflict that exists between Sawyer and Hopkinson not only creates different treatment for death row defendants who wish to receive retroactive application of Caldwell. This conflict also creates different treatment for defendants whose convictions became final after the Caldwell decision was rendered, who are entitled to its benefits per se under Teague. Robert Sawyer's case presents the opportunity to resolve several important and different conflicts among the circuits at the same time.

Finally, the State argues implicitly that the Fifth Circuit was wrong when it unanimously endorsed Caldwell's "no effect" test as the standard of review for valid Caldwell claims on the merits, and wrong when it unanimously rejected the State's claim that the Caldwell standard is identical to those of Darden v. Wainwright and Donnelly v. DeChristoforo. See Brief in Opp. at 11-17; see also Sawyer, slip op. at 5538-5539, 5541-5543 (Cert. Pet. App. at A-11-12, A-14-17). However, in urging this Court to deny review of a ruling which the State opposes, the State overlooks the fact that the Tenth Circuit's Hopkinson decision created a conflict in the circuits by rejecting the Fifth Circuit's position on the "no effect" test. The State's opposition to the Fifth Circuit's interpretation of Caldwell provides a further reason for this Court to grant review of Robert

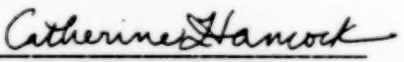
Sawyer's case in order to resolve the circuit conflicts concerning the proper definition of Caldwell violations.¹

It may be that this Court will decide to provide further guidance for lower courts by establishing more detailed standards for Teague's retroactivity rules in another death penalty case now pending before the Court, rather than decide to take review of the present case. If so, Robert Sawyer respectfully requests that this Court hold his case until such standards are provided, and then remand his case to the Fifth Circuit, with instructions for that court to reconsider its novel Teague rulings in light of the relevant retroactivity precedent in question decided this Term.

CONCLUSION

For the foregoing reasons, as well as the reasons described in the petition for certiorari, Robert Sawyer's petition for certiorari should be granted.

Respectfully submitted,


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January 3, 1990

¹ The State correctly notes that the state trial court issued an unpublished opinion in this case. Brief in Opp. at 1. A reference to this opinion was omitted inadvertently from the Petition for Certiorari. See Cert. Petition at 5. The text of the Petition should be amended to read as follows:

The state trial court denied the petition on the same day it was filed, without opinion. On appeal the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The case was submitted on the record and the trial court denied the petition in an unpublished opinion. On appeal the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The trial court denied the petition again at the close of the hearing without opinion, giving oral reasons.

It also should be noted that the State lists the Tulane University Law Clinic in its List of Parties, but the Clinic does not represent Robert Sawyer. His counsel are members of the Tulane law school faculty, and they are volunteer attorneys.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

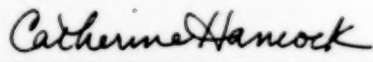
ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

CERTIFICATE OF SERVICE

I, Catherine Hancock, a member of the Bar of this Court, hereby certify that on this 3rd day of January, 1990, a copy of the Petitioner's Reply Brief in the above-entitled case was mailed, first-class postage prepaid, to William J. Guste, Attorney General of Louisiana, State Capitol Station, P.O. Box 44005, Baton Rouge, Louisiana 70804, and to Ms. Dorothy Pendergast, Office of the District Attorney, 24th Judicial District Court, New Courthouse Building, Gretna, Louisiana 70054, counsel for the respondent herein. I further certify that all parties required to be served have been served.



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APPENDIX TO PETITIONER'S REPLY BRIEF

[Excerpt from Robert Sawyer's Supplemental Brief on Teague v. Lane Issues in the U. S. Court of Appeals for the Fifth Circuit]

The Caldwell Court's judgment of the settled nature of its ruling is supported by the long-established tradition of state court decisions described in its opinion. One of the earliest state cases dates from 1877, when a Missouri Court reversed a death penalty verdict based on a misleading prosecutorial argument concerning appellate review. State v. Kring, 64 Mo. 591, 596 (Mo. App. 1877). The Kring Court found that such an argument was calculated to induce the jury to disregard its responsibility for a death verdict, and that even in the absence of an objection, the trial judge should have intervened to give prompt correction. Id. at 596. Many other state court rulings in capital cases between 1877 and 1985 created a blueprint both for Caldwell's holding, and for its multiple rationales. In capital cases, state courts uniformly condemned misleading,

uncorrected prosecutorial references to appellate review, reasoning that such arguments misled lay jurors concerning the powers of appellate courts and juries, lessened the jurors' sense of responsibility for a death verdict, distracted the jurors from their task of weighing evidence and deciding on punishment, interjected irrelevant factors into their exercise of discretion, and created a likelihood of prejudice in the form of a pro-death bias in their deliberations.

The fabric of the state court blueprint for Caldwell may be discerned in many capital cases. See, e.g., Wiley v. State, 449 So.2d 756, 762 (Miss. 1984) (remarks condemned, reversal required, remarks lessen individual juror's sense of awesome responsibility for fate of defendant, and give jurors false comfort that they have advisory role, when "all notions of justice" require jurors to appreciate the gravity of their decision); Williams v. State, 445 So.2d 798, 811-812 (Miss. 1984) (remarks condemned, reversal required, remarks give jury false comfort and lessen awesome responsibility); State v. Robinson, 421 So.2d 229, 233-234 (La. 1982) (remarks condemned, reversal required, remarks lessen jurors' awesome responsibility, divert attention from sentencing issue of appropriateness of death, mislead lay jurors about the powers of appellate courts, and interject irrelevant matters into the deliberations); State v. Willie, 410 So.2d 1019, 1033-1035 (La. 1982) (remarks condemned, reversal required, remarks diminish jurors' responsibility and sense of accountability); State v. Jones, 251 S.E.2d 425, 427-429 (N.C. 1979) (remarks condemned, reversal required, remarks will

be likely to result in jurors' reliance on the Supreme Court for ultimate determination of the sentence); State v. Gilbert, 258 S.E.2d 890, 894 (S.C. 1979) (remarks condemned, reversal required, remarks lessen jurors' responsibility); State v. Tyner, 258 S.E.2d 559, 565-566 (S.C. 1979) (remarks condemned, reversal required, remarks imply responsibility for death is lessened, and divert the jury from deciding the punishment on the evidence); Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977) (remarks condemned, reversal required); Fleming v. State, 240 S.E.2d 37, 40 (Ga. 1977) (remarks condemned, reversal required, remarks divert jury from basing verdict on evidence, suggest jurors' heavy burden can be passed on to appellate court, and have unusual potential for corrupting the sentencing process); State v. White, 211 S.E.2d 445, 450 (N.C. 1975) (remarks condemned, reversal required, remarks suggesting that jurors share responsibility with others for death verdict are prejudicial, remarks are intended to overcome natural reluctance to give a death verdict, lay jurors cannot understand the technicalities of the fact-or-law review distinction); Prevatte v. State, 214 S.E.2d 365, 367-368 (Ga. 1975) (remarks condemned, reversal required, remarks encouraged jury to take less than full responsibility for its awesome task, and remarks may have influenced the jury to give death when unbiased judgment would have given life, as jurors weigh imponderables in sentencing deliberations); People v. Morse, 388 P.2d 33, 43-44 (Cal. 1964) (trial judge's instruction about his power to reduce a death sentence is condemned, reversal required, remarks weaken jury's

sense of responsibility); State v. Mount, 152 A.2d 343, 352 (N.J. 1959) (trial judge's remarks about appellate review condemned, reversal required, remarks weaken jury's sense of obligation in performance of its duties, and deprive the defendant of a fair determination on the issue of life or death); Pait v. State, 112 So.2d 381, 384 (Fla. 1959) (remarks condemned, reversal required, remarks suggest that jury can disregard its responsibility, and unreviewable nature of death verdict makes remarks especially prejudicial); State v. Dockery, 77 S.E.2d 664, 668 (N.C. 1953) (remarks condemned, reversal required, remarks prejudiced the defendant's right to have the jury recommend life, and were calculated to induce the jury not to exercise its discretion to give a life sentence); State v. Hawley, 48 S.E.2d 35, 36 (N.C. 1948) (remarks condemned, reversal required, remarks tend to disconcert the jury in fairly deliberating and arriving at a just verdict); Pilley v. State, 25 So.2d 57, 59 (Ala. 1946) (remarks are condemned, because they lessened jurors' sense of responsibility, but no reversal required where judge gave immediate correction); People v. Johnson, 30 N.E.2d 465, 467 (N.Y. 1940) (remarks condemned, reversal required, remarks suggest jurors need not be greatly concerned about verdict); State v. Biggerstaff, 43 P. 709, 711 (Mont. 1896) (remarks were reprehensible, and calculated to cause jurors to be less cautious in weighing evidence and less mindful of duties, and would be grounds for reversal if issue were properly raised on appeal); Vaughn v. State, 24 S.W. 885, 889 (Ark. 1894) (remarks condemned, but no reversal where judge gave immediate correction).

I. THE "NO EFFECT" ANALYSIS USED IN CALDWELL WAS ENDORSED IN THE SUPREME COURT'S EIGHTH AMENDMENT RULINGS AND EMPLOYED BY STATE COURTS REVIEWING CALDWELL ERRORS IN THE PRE-CALDWELL ERA. THUS THE STATE CANNOT CLAIM THAT THE CALDWELL COURT EITHER FAILED TO APPLY SETTLED EIGHTH AMENDMENT PRINCIPLES TO THE CALDWELL PROBLEM, OR BROKE NEW GROUND BY ENDORSING THE PREVAILING STATE COURT SOLUTION FOR CALDWELL VIOLATIONS. CALDWELL'S ENTIRE FORMULA MUST BE GIVEN RETROACTIVE APPLICATION IN ROBERT SAWYER'S CASE.

The State properly concedes that Caldwell's ban on misleading prosecutorial argument about appellate review is not a "new rule," because its holding was "dictated by precedent," and broke no "new ground" under Teague v. Lane, 109 S. Ct. 1060, 1070 (1989). (State's Supp. Brief at 3 & 5, 4; see generally State's Supp. Brief at 3-6; accord, Robert Sawyer's Supp. Brief at 6-29.) However, the State asserts that Caldwell's "no effect" analysis does articulate a "new rule." (State's Supp. Brief at 7.) This assertion is contradicted by two bodies of law. First, the State chooses to ignore all the pre-Caldwell state court rulings which are cited in Robert Sawyer's Supplemental Brief. (See Robert Sawyer's Supp. Brief at 9-13, 20-28.) These rulings illustrate that state courts before Caldwell were using a "no effect" analysis in addressing the problem of uncorrected, misleading prosecutorial argument about appellate review. Second, the State fails to explain that the Eighth Amendment precedents upon which Caldwell relied, which are cited in the State's own brief, also employ a "no effect" analysis for Eighth Amendment violations that are found to pose a danger of unreliable death verdicts. In

light of these two bodies of law, Caldwell's entire holding must be given retroactive application to Robert Sawyer's case.

The Caldwell opinion reveals that the "no effect" analysis is a shorthand expression for a larger and more complex concept than the phrase itself implies. It is, in fact, a concept that expresses the Court's belief in the "presumed effect" of a particularly harmful Eighth Amendment violation upon death verdicts in all cases.

In Caldwell, for example, the Supreme Court found that there are many "specific reasons to fear substantial unreliability as well as bias in favor of death sentences" when misleading prosecutorial arguments about appellate review are made to a sentencing jury. Caldwell, 472 U.S. at 330. These reasons exist in all cases, and they create four dangers. As the Supreme Court put it, a misleading argument about appellate review creates "an intolerable danger of bias toward a death sentence" based on the jurors' desire to "send a message of disapproval" for the defendant's acts; it creates "the danger of a defendant's being executed in the absence of any determination that death was the appropriate punishment" when a death verdict is returned so that "delegation" to appellate courts can occur; it creates "an intolerable danger that the jury will in fact choose to minimize the importance of its role" because of the difficult and uncomfortable role the jurors have; and finally it creates a "chance" of the jury's reliance on the expertise of appellate courts that "will generate a bias toward returning a death

sentence [which] is simply too great." Id. at 331, 332, 333, id. Given these constant dangers of unreliability and pro-death bias that exist in all cases, the Caldwell Court refused to attempt to measure the actual impact of a misleading argument upon a death verdict in light of the totality of the evidence. Instead, some injurious impact will be presumed "[b]ecause we cannot say that [the argument] had no effect on the sentencing decision." Id. at 341.

This same "presumed effect" analysis was used by state courts reviewing Caldwell errors in capital cases in the era following Furman v. Georgia, 408 U.S. 238 (1972). (See, e.g., cases from Georgia, Louisiana, Mississippi, North Carolina, and South Carolina cited in Robert Sawyer's Supp. Brief at 10-11.) In some cases, the state courts actually expressed the "presumed effect" concept of Caldwell in so many words. See, e.g., State v. Robinson, 421 So.2d 229, 234 (La. 1982) ("we cannot say that the jury's sentencing decision was unaffected" by the misleading argument); State v. Jones, 251 S.E.2d 425, 429 (N.C. 1979) (any reference "which would have the effect of minimizing in the jury's minds their role" is precluded, as "such reference will, in all likelihood, result in the jury's reliance" on an appellate court); Prevatte v. State, 214 S.E.2d 365, 368 (Ga. 1975) (a reference to appellate review is likely to be cause for reversal of a death verdict because "in the weighing of imponderables it cannot be concluded that the jury were not influenced by such statements"). In other cases, the state courts simply applied the "presumed effect" concept by reversing death verdicts because

of bad arguments without inquiring into the actual impact of the argument upon the verdict in light of the totality of the evidence. (See, e.g., other state cases cited in Robert Sawyer's Supp. Brief at 10-11.) The same pattern of analysis is also evident in state court rulings on Caldwell error in the pre-Furman era, in both capital and non-capital cases. (See, e.g., state cases cited in Robert Sawyer's Supp. Brief at 11-13.) See Caldwell, 472 U.S. at 333-334 & n.4 & n.5 (citing state cases in support of its holding).

The State not only fails to take account of the old and widespread state court practice of employing a "no effect" or "presumed effect" analysis for Caldwell errors in the pre-Caldwell era. It also ignores the fact that the Eighth Amendment precedents upon which Caldwell relies, and which are cited in the State's brief, also employ the same analysis. (See State's Supp. Brief at 3-5.) See Caldwell, 420 U.S. at 329 & n.2, 330, 333, 340 (citing principles from Eighth Amendment precedents in support of its holding). For example, where a capital defendant actually presents relevant mitigating evidence to a trial judge who refuses to allow it to be considered in a sentencing hearing, the Supreme Court requires reversal of a death verdict, without making a calculation of the actual impact of this error on the verdict in light of the totality of the evidence. See Eddings v. Oklahoma, 455 U.S. 104, 114-117 (1982) (plurality opinion); Eddings, 455 U.S. 104, 117, 118-119 (O'Connor, J., concurring). Likewise where a sentencing judge relies on a presentencing report containing any material not disclosed to counsel, the

Supreme Court requires reversal of a death verdict without any inquiry into the nature of the undisclosed information or its actual impact on the verdict in light of the evidence. See Gardner v. Florida, 430 U.S. 349, 353-354, 357-362 (1977) (plurality opinion); Gardner, 430 U.S. 349, 362, 362-364 (White, J., concurring). See also Lockett v. Ohio, 438 U.S. 586, 606-609 (1978) (plurality opinion) (reversing death verdict because of improper statutory bar to consideration of relevant mitigating evidence, without regard to actual impact of such a bar on the verdict); Woodson v. North Carolina, 428 U.S. 280, 301-305 (1976) (plurality opinion).

No. 89-5809

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1989

ROBERT SAWYER,

Petitioner,

vs.

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1989
CERTIORARI GRANTED JANUARY 16, 1990

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DOCKET ENTRIES

DIV. G., 24th J.D.C., JEFFERSON PARISH, LOUISIANA

September 28, 1979 Grand Jury Indictment
 September 19, 1980 Jury verdict
 October 16, 1980 Sentence
 March 31, 1981 Notice of Intent to Appeal

LA. SUPREME COURT

October 18, 1982 Affirmed Conviction and Sentence
 November 24, 1982 Denied Application for Rehearing
 February 10, 1983 Granted Stay of Execution

U.S. SUPREME COURT

July 6, 1983 Remanded to the La. Supreme Court

LA. SUPREME COURT

November 28, 1983 Affirmed after remand
 January 6, 1984 Denied Rehearing

U.S. SUPREME COURT

April 2, 1984 Denied application for writ of certiorari

DIV. G., 24th J.D.C., JEFFERSON PARISH, LOUISIANA

May 8, 1984 Denied petition for post-conviction relief and writ of habeas corpus

LA. SUPREME COURT

May 10, 1984 Granted application for writ of review stay of execution and remanded to trial court for evidentiary hearing

DIV. G., 24th J.D.C., JEFFERSON PARISH, LOUISIANA

February 8, 1985 Denied application for post-conviction relief and writ of habeas corpus after remand

LA. SUPREME COURT

May 13, 1985 Granted writ and again remanded to trial court for evidentiary hearing

DIV. G., 24th J.D.C., JEFFERSON PARISH, LOUISIANA

July 12, 1985 Denied petition for post-conviction relief and writ of habeas corpus after evidentiary hearing

LA. SUPREME COURT

December 13, 1985 Denied application for supervisory writs and writ of habeas corpus

U. S. DISTRICT COURT, E. D.

September 9, 1986 Findings and Recommendations of magistrate

April 8, 1987

Magistrates's findings and recommendations affirmed. Certificate of probable cause and stay of execution granted.

U. S. COURT OF APPEALS, 5th DISTRICT

June 30, 1988 Affirmed denial of petition for writ of habeas corpus

August 25, 1988 Granted rehearing en banc

March 30, 1989 Requested Supplemental Briefs on Teague v. Lane issues

August 15, 1989 Affirmed denial of petition for writ of habeas corpus after rehearing en banc

U. S. SUPREME COURT

January 16, 1990 Granted certiorari

TWENTY-FOURTH JUDICIAL DISTRICT
COURT OF LOUISIANA

)	
)	Parish of
THE STATE OF LOUISIANA)	JEFFERSON
)	
Twenty-Fourth Judicial District)	SS.
)	
)	Twenty-Fourth
)	Judicial District
)	Court

The Grand Jurors of the State of Louisiana, duly empaneled and sworn, in and for the body of the Parish of JEFFERSON in the name and by the authority of the said State, upon their Oath, present: That one CHARLES W. LANE and ROBERT W. SAWYER late of the Parish of JEFFERSON on or about the TWENTY-EIGHTH (28) day of SEPTEMBER in the year of our Lord, One Thousand Nine Hundred and SEVENTY-NINE (1979) with force of arms, in the Parish of JEFFERSON aforesaid, and within the jurisdiction of the Twenty-Fourth Judicial District Court of Louisiana, in and for the Parish of JEFFERSON aforesaid, then and there being committed first degree murder of Frances Arwood, contrary to the form of the Statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State.

/s/ illegible

Asst. District Attorney
of the Twenty-Fourth
Judicial District.

Comp. #9-16496-79

24th JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA

Louisiana v. Robert Sawyer

(Transcript excerpts from Sentencing
Hearings, September 19, 1980)

[934] THE COURT: Ladies and gentlemen, this phase of the trial is what is called a sentencing hearing. The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that should be imposed. You now have the duty to recommend whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence. When recommending the sentence to be imposed you should consider the circumstances of the offense and the character and propensity of the defendant. At the conclusion of this hearing I will instruct you in detail as to what the law requires in deciding which sentence is to be imposed. What I [940] have given to you are two lists. One is a list of aggravating circumstances for you to consider and the other is a list of mitigating circumstances that would tend to benefit Mr. Sawyer. At the conclusion of this hearing you will take those two lists with you back into the jury room and then you will consider them along with whatever evidence is going to be presented to you right now.

MR. BOUDOUSQUE: I call Peter Thomas.

* * *

[Closing Arguments]

Argument by the state from 4:15 p.m. to 4:25 p.m. as follows:

MR. BOUDOUSQUE: Ladies and gentlemen, we are now at the second phase of the proceedings you were told about during the course of the voir dire. You will decide if the crime and relating circumstances fit into technical [981] definition of the law. The law states that the sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstances exist and after consideration any mitigating circumstances recommends the sentence of death be imposed. The jury shall be furnished a copy with the statutory aggravating and mitigating circumstances. The State is going to contend there are four aggravating circumstances that the jury can find without a reasonable doubt. One, the following shall be considered, aggravating circumstance. When the offender is engaged in the perpetration (sic) or the attempted perpetration of an aggravated rape or an aggravated arson. Just the facts of the crime alone can be considered as an aggravating circumstance. Two, where the offender has been previously convicted of an unrelated murder, aggravated rape, aggravated kidnapping or has a significant prior history of criminal activity.

Well you have heard Robert Sawyer own sister tell you that he has been a follower of the law most of his life. You also heard of a 1974 conviction where the defendant took the life of a four year old child, was indicted for second degree murder and was convicted of involuntary manslaughter. Where the offense was committed in an especially heinous and atrocious and cruel manner. (The D.A. displays the photographs.) Need I say more, and where the offender knowingly [982] created a risk of death or great bodily harm to more than one person.

There were two small children as well as Cynthia Shano in that house. That will be a question of fact for the jury to decide. The law provides that if you find one of these circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those type of decisions but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision. This man is almost thirty years old, thirty-one years old. He is an adult. You heard his sister testify. I have compassion and I certainly have understanding and some [983] emotions about her feelings. Although I must tell you when I listened to some of the things that she said concerning how beautiful that four year old child was treated and I am somewhat maybe, maybe I was a little harder than I should have been when I asked her questions. For that I apologize, but it was only an instinctive reaction on

my part but the facts remain there are many of us in this life, life is not an easy thing but life is the most important thing we know and when someone takes it in his own hands for whatever reason because he wants to get it off and have his joys and jollies, when he decides to take another life into his hands and in this case two within a five year period, then the line has to be drawn. This man is never going to change. He has committed two homicides in five years. You have experienced a certain amount of emotions in this case. I am sure your heart goes out to his sister and maybe to his nephew. During the course of this trial I haven't been so lucky. The only person that I've been able to converse with is Mr. Beckendorf. Frances Arwood is not here. I wish she could tell you what she went through on September 28 when she was locked into that chamber of horrors, when over that extended period of time this man so savagely and brutally along with Charles Lane beat, kicked, poured scalding hot water, raped, set her on fire, see what I'm trying to say, that Frances is not here. I didn't ask her mother to come back. I thought that the emotional aspect of [984] what she had to undergo the first time was enough but think about how she feels. Think about that if that was your child or your wife or your relative. What I'm trying to say is that it is nice and easy to put Frances Arwood in the abstract but she will never know another sunrise. She will not know what is basic to you and me which is living. There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this

Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. I submit to you when you evaluate the facts of this case and you make a comparison with the atrocious nature of the facts of this case, the facts of the case that you heard about when little Laurie Durham, four year old, lost her life, I think you will decide that there are at least three or four aggravating circumstances which you could reasonably impose in order to justify a death penalty verdict. [985] It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have cross examined him and gone more and more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal after Mr. Weidner argues. Thank you.

Closing argument by the Defense from 4:25 p.m. to 4:35 p.m. as follows:

MR. WEIDNER: Ladies and gentlemen, I don't quite know what to say. I have never been in this position before. I guess I am doing exactly what Mr. Boudousque told you I was going to do. The decision whether Robert Sawyer [986] lives or dies is in your hands for one very simple reason. Should you decide today that he gets life imprisonment, well then the issue of whether or not he would be executed never comes up again. The issue remains a life only if you decide that he should be executed. I don't know what I can say for Robert Sawyer. He is a poor miserable little human being. He has had a hell of a life. He was involved in a very heinous act. He has been in a mental hospital. Like Doctor Arneson told you probably a sociopath. We know and it is never been attempted to be rebutted that Mr. Sawyer was intoxicated the day this incident with Frances Arwood occurred. You obviously believe that he is guilty of first degree murder. That is your verdict. How can we believe, I know I can't, any one in their right mind or in possession of their faculties could do something like this. I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. Charles Lane is serving life imprisonment. I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

Rebuttal argument by the State from 4:35 p.m. to 4:40 p.m. as follows:

MR. BOUDOUSQUE: Mr. Weidner states that if you recommend life [987] imprisonment instead of the electric chair then you will never have to worry about the issue of whether or not Mr. Sawyer will receive the chair. At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. He speaks in terms of his personal feelings of the death penalty. Such a decision is never easy to make but if Louisiana law, if the law which we have in this state is to have any piece, if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the line because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior [988] conviction for killing a four year old child, then what are the people of this Parish to believe. They are going to

believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. Don't you see that the criminal justice system, ladies and gentlemen, is not the courts, it's not the judges, it's not technicalities of defense lawyers, it is nothing more than people like you and me and if you are not capable of making these types of decisions so well then you are right, there will be a breakdown and there has been a breakdown but I will tell you what imperfect is, the system is. At least this man has had the occasion to be judged by twelve men of his peers, twelve men and woman of his peers and in some other countries he may have been taken out and summarily executed. He has had the due process of law and then he expects you because Charles Lane he did that for a reason because he wants to say well Charles Lane got life imprisonment upon conviction of first degree murder but this man should get the same. Well if I were to tell you that Charles Lane, that I was the prosecutor in that case and the evidence that was presented for Charles Lane, Charles Lane never had a conviction.

MR. WEIDNER: Objection.

THE COURT: The Court sustains that.

[989] MR. BOUDOUSQUE: There are aggravating circumstances possibly Mr. Lane did not have.

MR. WEIDNER: Objection again.

MR. BOUDOUSQUE: I'm talking about aggravating circumstances.

THE COURT: You can argue that.

MR. BOUDOUSQUE: There are certain aggravating circumstances that are involved and maybe the jury didn't find that those aggravating circumstances existed and maybe the jury found that as a matter of fact he was a passing participant and not the main activist in this heinous chain of events. This is the man. He is the one and I think in your heart you know that so no matter how unpleasant or how difficult this type of decision may be for you to make, if you really analyze it you don't have a choice. There is only one verdict that can be rendered in this case and there will be a strong symbolism related to that penalty. You the people are part of the criminal justice system. You now know how it works. Now is that time and I ask that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend [990] the imposition of the death penalty. Thank you.

[Jury Instructions]

THE COURT: Ladies and gentlemen, before I begin, Charles Lane was not tried in this Court by you and I ask that you disregard any reference to Charles Lane's trial. That trial had nothing to do with or should have nothing to do with your deliberations. Whatever happened to Charles Lane certainly should be of no concern to you. All right.

Having found Robert Sawyer guilty of first degree murder you must now determine whether he should be

sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence. It is your duty to consider the circumstances of the offense and the character and propensities of Robert Sawyer to determine which sentence should be imposed. In reaching your decision regarding the sentence you must be guided by these instructions. You are required by law to consider the existence of aggravating and mitigating circumstances in deciding which sentence to impose. The statutory aggravating circumstances are listed on the sheet of paper you have. The District Attorney contends that four of those circumstances are applicable to this case and if you look at your list you will see A, the offender was engaged in the perpetration or attempted perpetration of aggravated rape or aggravated arson. B, obviously does not apply. C states that the offender was previously convicted of an unrelated murder, aggravated [991] rape or aggravated kidnapping or I say significant prior history of criminal activity. Did the defendant knowingly create a risk of death or great bodily harm to more than one person and if you drop on down to G it states that the offense was committed in an especially heinous, atrocious or cruel manner. Before you decide that a sentence of death should be imposed you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance exist. If you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed you are authorized to consider imposing a sentence of death. If you do not unanimously find beyond a reasonable doubt any of the statutory aggravating circumstances existed the life imprisonment without probation or parole or suspension of

sentence is the only sentence that may be imposed. Even if you find the existence of an aggravating circumstance you must also consider any mitigating circumstances before you decide a sentence of death should be imposed. The law specifically list certain mitigating circumstances and you have the list. These mitigating circumstances are A, the offender has no significant prior history of criminal activity. B, the offense was committed while the offender was under the influence of extreme mental or emotional disturbance. C, the offense was committed while the offender was under the influence or domination of another person. D, the offense was committed under circumstances [992] which the offender reasonably believed provide a moral justification or extension of his conduct. E, at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. F, the youth of the offender at the time of the offense. G, the offender was a principal whose participation was relatively minor and H, any other relevant mitigating circumstances. You will note that you are authorized to consider any relevant mitigating circumstances. The fact you are given a list of aggravating and mitigating circumstances should not cause you to infer the Court believes that any of these circumstances do or do not exist. The law requires that the jury be given such a list in every case. Whether any of the aggravating or mitigating circumstances exist is a fact for you to determine based upon the evidence presented. In addition to the evidence presented at this sentencing hearing in deciding the sentence to be imposed you may consider

evidence presented during the guilt determination trial that was brought you earlier. In just a moment the clerk will hand you two blank forms of verdicts. The first formal verdict reads having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to [993] death. In the event you should unanimously decide the death penalty should be imposed, a space is provided for you to write out the statutory circumstance or circumstances unanimously found to exist. The foreman will sign the form. The second formal verdict reads, the jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence. This verdict form is to be used if you cannot unanimously agree that the death penalty should be imposed. If the jury decides that a life penalty without probation or parole or suspension of sentence should be imposed the foreman will sign that formal verdict, no listing of aggravating or mitigating circumstances are required if you use this second verdict form. Nothing said or furnished you in these instructions should be taken as an opinion of the Court as to the existence or not of statutory aggravating or mitigating circumstances. It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment. Go with Mr. Miller back in the jury room.

(Jury retired at 4:45 p.m. The jury returned at 5:20 p.m.)

THE COURT: Would you hand Mr. Miller the verdict form.

THE BAILIFF: Louisiana versus Sawyer. Verdict, having found [994] the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstances found: 1.) the offender was engaged in the perpetration of aggravated arson, 2.) the offender was previously convicted of an unrelated murder, 3.) the offense was committed in an especially heinous, atrocious and cruel manner. Signed Susan B. Roundtree, forewoman.

MR. WEIDNER: Would you poll the jury.

THE CLERK:

Q Mr. Ragas, is that your verdict?

A Yes.

Q Miss Roth, is that your verdict?

A Yes.

Q Mr. Andressen, is that your verdict?

A Yes.

Q Mr. Drumm, is that your verdict?

A Yes.

Q Mr. Akerman, is that your verdict?

A Yes.

Q Mr. Cacioppo, is that your verdict?

A Yes.

Q Mr. Leaber, is that your verdict?

A Yes.

Q Mr. Pollack, is that your verdict?

A Yes.

[995] Q Miss Roundtree, is that your verdict?

A Yes.

Q Mr. Wood, is that your verdict?

A Yes.

Q Miss Dunne, is that your verdict?

A Yes.

Q Miss Gusman, is that your verdict?

A Yes.

THE COURT: That is twelve. The Court will remand Mr. Sawyer to the Parish Prison and I will schedule sentencing later.

LOUISIANA VS. SAWYER

VERDICT

Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstances found:

- (1) the offender was engaged in the perpetuation of aggravated arson;
- (2) the offender was previously convicted of an unrelated murder;
- (3) the offence was committed in an especially hideous, atrocious and cruel manner.

GRETN, LOUISIANA, this 19th day of September, 1980.

/s/ Susan B. Roundtree
Foreman

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

No. 79-2841

vs.

Division G

Date SEPT. 19, 1980

ROBERT SAWYER

DISTRICT ATTORNEY BOUDOUESQUE

JUDGE GAUDIN

THE COURT TOOK UP THE MATTER OF STATE OF LOUISIANA VS. ROBERT SAWYER.

PRESENT WERE:

PHIL BOUDOUESQUE REPRESENTING THE STATE

JAMES WEIDNER REPRESENTING THE DEFENSE

ROBERT SAWYER THE DEFENDANT

THE JURY WAS POLLED. ALL PRESENT.

10:05 CLOSING ARGUMENTS BY THE STATE
CLOSING ARGUMENTS BY THE DEFENSE WAIVED.

11:02 THE COURT CHARGED THE JURY, AND THE
JURY WENT INTO DELIBERATION

2:35 THE JURY RETURNED WITH A VERDICT OF
GUILTY AS CHARGED.
(1st DEGREE MURDER)

3:00 THE COURT TOOK UP THE SENTENCING POR-
TION OF THE TRIAL.

STATE WITNESSES:

PETER THOMAS

STATE EXHIBITS:

S 1 ACTS OF CONGRESS

S 2 CHARGES FROM THE STATE OF ARKANSAS

DEFENSE WITNESSES:

GLENDA WHITE

GLEN SMITH

THE STATE & DEFENSE RESTED.

5:05 THE JURY RETURNED WITH A VERDICT RECOM-
MENDATING (sic) THE DEATH PENALTY BE EN-
FORCED.

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

No. 79-2841

vs.

Division G

Date 10-16-80

Robert Sawyer

DISTRICT ATTORNEY BOUDOUESQUE
JUDGE GAUDIN

THE DEFENDANT ROBERT W. SAWYER APPEARED
BEFORE THE BAR OF THE COURT THIS DAY FOR
HEARING ON A MOTION FOR A NEW TRIAL, REPRESENTED BY JAMES WEIDNER, ATTORNEY. MOTION AS TAKEN UP, MOTION DENIED BY THE COURT, THE DEFENDANT WAIVED DELAYS AND SENTENCING HAVING EXECUTED ALL FURTHER DELAYS THE COURT SENTENCED THE DEFENDANT TO DEATH, AND THE DEFENDANT IS COMMITTED TO THE LOUISIANA DEPARTMENT OF CORRECTION FOR THE EXECUTION OF SAID SENTENCE IN CONFORMITY WITH L.S.A.-R.S. 15:824.

THE DEFENCE ATTORNEY ORALLY ADVISED THE
COURT OF HIS INTENTIONS OF FILING FOR AN AP-
PEAL. THE DEFENDANT IS REMANDED TO THE PAR-
ISH PRISON FOR TRANSPORTATION. THE
DEFENDANT GAVE HIS DATE OF BIRTH.

DATE OF BIRTH AS 8-10-50 AND HIS AGE AS 30
YEARS OLD.

/s/ Grady Lewis
Deputy Clerk

NOTICE OF APPEAL

THE STATE OF LOUISIANA	TWENTY-FOURTH JUDICIAL DISTRICT COURT
VS.	PARISH OF JEFFERSON
ROBERT SAWYER	STATE OF LOUISIANA
File Number 79-2841	H. Charles Gaudin
DIVISION	Judge Presiding
"G" NO. 248	

NOTICE is hereby given that on MARCH 31, 1981, upon motion of Defense Attorney ROBERT T. GARRITY, JR., in the above numbered and entitled cause, an order of appeal was entered granting a Criminal Appeal returnable on the 1ST day of JUNE, 1981.

Clerk's office, Gretna, Louisiana, this 7th day of April, 1981.

/s/ Genny Venette
DEPUTY CLERK OF COURT

STATE of Louisiana

v.

Robert SAWYER

No. 81-KA-1566

Supreme Court of Louisiana

Oct. 18, 1982

Rehearing Denied Nov. 24, 19

LEMMON, Justice.

This is an appeal from a conviction of first degree murder and a sentence of death. The principal issue on review of the guilt phase of the trial is the sufficiency of the evidence of aggravated arson as an essential element of the offense. R.S. 14:30. The principal issues on review of the penalty phase involve (1) admission into evidence of defendant's indictment for second degree murder in an unrelated incident and his subsequent plea to involuntary manslaughter, (2) the sufficiency of the evidence supporting the aggravating circumstances found by the jury, and (3) the prosecutor's closing argument.

Facts

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.¹

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed the Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.²

¹ Whether Ms. Shano stayed out all night with defendant or returned home earlier during the evening was the subject of conflicting testimony. That dispute, however, is not critical to the resolution of any significant factual or legal issue in the case.

² One of the doctors described the cause of her death as "metabolic exhaustion" resulting from severe blows to her head and incredibly severe (third degree) burns over more than one-third of her body.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists.³ A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms.

³ She was probably also forced to engage in sexual intercourse with Lane during a brief period when Lane was left to guard her while defendant was boiling water in the kitchen to scald her. Although the record does not necessarily support an inference that she was raped at that point in time, this is not fatal to either the conviction or the sentence, as will be discussed later.

Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.⁴

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. The also saw defendant sitting with his feet propped up on the edge of the couch.

⁴ Ms. Shano testified that Lane told her his sex organ had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. She further testified that defendant then told Lane "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get".

There were also burn marks on the new sheets on the sofa bed as a result of the incident, and defendant's fingerprints were found on a can of lighter fluid.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

The grand jury indicted both men for first degree murder. Lane was convicted in a separate trial and sentenced to life imprisonment.⁵ Defendant was convicted and sentenced to death.

Review of Guilt Phase

Defendant contends the evidence was insufficient to establish the essential elements of first degree murder.

R.S. 14:30, defining first degree murder, at the time of the offense provided in pertinent part:

"First degree murder is the killing of a human being:

"(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . aggravated arson . . . ;"

Although defendant presented the testimony of laymen and psychiatrists regarding his allegedly intoxicated condition and its effect on his ability to form a specific intent to kill or inflict great bodily harm, the jury reasonably rejected the defense. There was ample evidence from the testimony of the arresting officer and Ms. Shano

⁵ His conviction was affirmed by this court. See *State v. Lane*, 414 So.2d 1223 (La. 1982).

from which a rational juror could have found that defendant acted with specific intent, despite his excessive consumption of alcohol.

There was also ample evidence from which a rational juror could have concluded beyond a reasonable doubt that defendant was engaged in the perpetration of aggravated arson.⁶ His act of igniting a flammable liquid, after pouring it onto the bed sheet (a movable) and the body of a helpless human being, certainly created a foreseeable risk of endangering human life. (This act also evidenced the specific intent to inflict great bodily harm.) The resulting flames set fire to the sheet and produced severe burns on the victim's body.⁷ Thus, the evidence was

⁶ R.S. 14:51 defines aggravated arson as follows:

"Aggravated arson is the intentional damaging by any explosive substance or the setting fire to any structure, watercraft, or movable whereby it is foreseeable that human life might be endangered."

⁷ We need not decide in this case whether merely setting fire to a flammable liquid, after pouring it over the body of an unconscious human being, constitutes aggravated arson. In this case the element of setting fire to a movable was satisfied by the burning of the bed sheet (as proved by the photographs of the sheet showing holes with charred edges, rather than mere scorching or blackening as defendant argues). We also note that in *Lane* this court referred, in another context, to the burning of the sheet as satisfying that essential element of the offense, as follows:

"The record reflects testimony of lighter fluid being poured on the victim and on surrounding sheets and sofa bed. The victim was then set on fire, as was the bedding around her. Lighter fluid is an explosive substance. There is no doubt that these acts were intentional and it was surely foreseeable that Frances

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plainly sufficient to support the conviction.⁸ See *State v. Lane*, above; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Additional Facts in Penalty Phase*

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Arwood's life would be endangered by such acts. The trial judge reasoned that the fabric around the victim and the sofa bed could certainly be considered movables within the meaning of the statute. In our opinion, the trial judge was correct in charging the jury as to the definition of aggravated arson." 414 So.2d at 1228.

The setting fire to a flammable liquid, after placing the liquid in close proximity to a human body, obviously creates the foreseeable risk of great harm. Arguably, such an act constitutes aggravated arson under R.S. 14:51, because of the setting fire to the flammable liquid, which is a movable, even if no other movable is burned.

Under statutes defining arson in terms of the burning of dwellings (at common law, arson was an offense against habitation), it was logical for courts to reason that the mere setting fire to "kindling" for the purpose of burning a house was not arson, unless the house *itself* was burned. See R. Perkins, *Criminal Law*, Ch. 3, § 2B and C (2d ed. 1969). However, when a statute (such as R.S. 14:51) is extremely broad with respect to the nature of the "thing" set afire, and the statute's focus is primarily on the creation of foreseeable risk of great harm to humans, the igniting of "kindling" or lighter fluid for the purpose of engulfing a human body (or part of a human body) in flames might suffice – as long as the endangerment element is satisfied.

Nevertheless, as stated above, resolution of that question is not required here, because defendant did set fire to bedclothes by pouring lighter fluid and igniting it, and that act endangered the victim's life.

⁸ The evidence was sufficient to support the conviction because of the jury's supported finding as to the commission of

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At the sentencing hearing, both the state and defendant offered additional evidence.

Over defense objection, the state called a deputy prosecutor from Arkansas to present documentary evidence establishing the circumstances of defendant's prior indictment for second degree murder in the killing of a four-year-old child and his eventual plea to involuntary manslaughter. The records also revealed that the trial court was presented with the facts of the incident before accepting defendant's plea of guilty to involuntary manslaughter and sentencing him to serve three years in

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the offense of aggravated arson, and it is unnecessary to determine whether the evidence also established beyond a reasonable doubt that defendant was a principal to the offense of aggravated rape. Significantly, the jury found (in enumerating the aggravating circumstances after the penalty hearing) that defendant was engaged at the time of the killing in the commission of an aggravated arson (and not of an aggravated rape).

There was no error, however, in the trial judge's instructing the jury regarding the elements of aggravated rape. The evidence justified an instruction on the essential elements of the offense, and the jury was capable of drawing reasonable inferences from the evidence based on the trial court's instructions.

Finally, the prosecutor's mention in closing argument (without contemporaneous objection) that there were two rapes, one of which was proved by the fact that Lane was alone in the bathroom with the victim for 10 to 20 minutes, was certainly not sufficiently prejudicial to warrant a reversal of the conviction.

prison.⁹ Defendant was released on parole after one year and successfully completed his parole.

Defendant and his older sister both testified about defendant's unhappy childhood. Defendant's mother committed suicide shortly after the birth of defendant and a twin sister, when the older sister was only four years old. The circumstances forced the family to separate, and, according to defendant's sister, his father seemed to blame defendant for the family woes. He was extremely harsh and brutal with defendant.¹⁰ As a child,

⁹ According to the facts contained in the record, the young victim, who was the daughter of a woman with whom defendant was living, had been left in defendant's care while her mother went to work. Defendant brought the child to the emergency room of the hospital to be treated for injuries, which eventually resulted in her death. The medical evidence indicated that the child received a severe blow to the head. Further examination revealed bruises, scars and burn marks suggesting that the little girl had been the victim of earlier physical abuse.

The Arkansas prosecutor eventually accepted defendant's plea that the killing was committed "without malice" and without an intent to "produce death". See Section 41-2209, Arkansas Criminal Code. Defendant claimed that he was trying to discipline the child (who was allegedly "playing in her food") when the child's highchair fell over, causing her to hit her head on the concrete floor.

¹⁰ One incident related by defendant's older sister described the frustration he faced as a child. His grandfather had given defendant a calf to raise. His father persuaded defendant to let him sell the calf to raise funds for the farming operation, agreeing to allow defendant to participate in a ball game in town. When the day of the eagerly awaited game arrived, the father refused to drive the boy to town, and defendant, then a preteen child, walked and hitchhiked the eight miles to the town. Upon his return, his father brutally beat him for acting contrary to his wishes.

defendant was faced with long hours of hard work on his father's Tennessee farm. He received few rewards or gratifications for his labors, either in terms of parental words or actions reflecting praise and affection, or in opportunities for traditional childhood activities.

Understandably, defendant began to run away at an early age. He was eventually institutionalized, but ran away from the state mental health facility. He lived with various relatives until he was about 17, when he left to begin a series of riverboat jobs.

Defendant also gave his version of the events leading to his prior conviction for involuntary manslaughter. In response to defendant's professions of accident and of love and affection for the child, the prosecutor cross-examined him about the cause of various injuries on the child's body and about a statement he gave to police admitting that he had whipped the child.

Despite the evidence offered in mitigation, the jury recommended the death penalty, relying on three aggravating circumstances: (1) that defendant was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that defendant had previously been convicted of an unrelated murder.

Review of Penalty Phase

Because the jury recommended the death penalty, this court must review the record to determine that the prosecutor and the trial court adhered to the procedural

protections outlined by the Legislature and that the sentence is not excessive. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In reviewing a death sentence, we are required by Supreme Court Rule 28 to consider:

- (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
- (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Sufficiency of Evidence of Statutory Aggravating Circumstances

C.Cr.P. Art. 905.3 requires that the jury find beyond a reasonable doubt the existence of at least one of the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4 before the jury can even consider recommendation of the death sentence. And Supreme Court Rule 28, § 1(b) requires that this court, on review for excessiveness, determine that the jury's finding was supported by the evidence.

The jury found the existence of three statutory aggravating circumstances. The evidence is clearly sufficient, as discussed earlier, to support the jury's finding with respect to the commission of an aggravated arson. The evidence also supports the jury's finding that the offense

was committed in an especially cruel, atrocious and heinous manner.¹¹

Defendant argues, however, that every aggravating circumstance found by the jury must be supported by the evidence and that the evidence does not support a finding that defendant was previously convicted of an unrelated murder. See *State v. Monroe*, 397 So.2d 1258 (La. 1981). The last portion of defendant's argument is correct, in that a finding of a conviction for an unrelated murder is not supported by a record which reflects only a conviction for involuntary manslaughter. *State v. Culberth*, 390 So.2d 847 (La. 1980). However, C.Cr.P. Art. 905.3 only requires that the jury find the existence of one aggravating circumstance in order to consider recommending a sentence of death.

This court has upheld death sentences when only one of several aggravating circumstances found by the jury was supported by the evidence (as long as defendant was not unduly prejudiced by failure to comply with procedural safeguards or by the influence of arbitrary factors during the penalty phase, and as long as the death sentence was not otherwise excessive). *State v. Martin*, 376

¹¹ This court has construed this provision to include only those homicides in which the victim was subjected to "serious physical abuse . . . before death". *State v. Sonnier*, 402 So.2d 650, at 659 (La. 1981). Thus, only in those cases in which the offender tortured or pitilessly inflicted unnecessary pain on the victim has this court held that this aggravating circumstances was supported by the evidence. See *State v. Baldwin*, 388 So.2d 664 (La. 1980). See also *State v. Culberth*, 390 So.2d 847 (La. 1980). The record in this case overwhelmingly supports such a finding.

So.2d 300 (La. 1979), cert. denied, 449 U.S. 998, 101 S.Ct. 540, 66 L.Ed.2d 297; *State v. Monroe*, above.¹² The adequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenders properly exposed to the possibility of the death sentence.¹³ See *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982) (en banc).

¹² At the time of this offense (although not at the time of the crime in the *Martin* and *Monroe* decisions), R.S. 14:30 required, as an essential element of first degree murder, the existence of at least one of four enumerated aggravating circumstances, which were also among the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4. Therefore, under the present law the class of murderers for which the death penalty is potentially available has already been narrowed by the additional elements now necessary for a conviction of first degree murder, and a supported verdict of guilty of first degree murder in the guilt phase of the trial automatically fulfills the threshold requirement of a finding of at least one statutory aggravating circumstances, thereby authorizing the jury to consider imposing the death penalty. The penalty phase now serves primarily to afford an opportunity for the prosecution to offer proof of additional aggravating circumstances and for the defense to offer proof of mitigating circumstances.

¹³ In *Zant v. Stephens*, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), the United States Supreme Court (after the death sentence was reversed by a three-judge panel of the Fifth Circuit) remanded to the Supreme Court of Georgia for certification of the question of the state law premises that support the validity of the death sentence when one of the statutory aggravating circumstances found by the jury was constitutionally invalid. The present case, unlike *Stephens*, does not involve a facially unconstitutional aggravating circumstance. Moreover, C.Cr.P. Art. 905.3 is the state law basis in Louisiana for the jury's consideration of imposition of the death penalty

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Thus, under Louisiana's statutory scheme, the jury at the penalty trial must in effect make two separate but closely related findings in order to recommend a death sentence. The jury must first find the existence of *at least one* statutory aggravating circumstance as a threshold requirement before even considering imposition of the death penalty. If an aggravating circumstance is found, then the jury must take into account any mitigating circumstances and must make a separate finding regarding whether the death penalty should be imposed, *considering both the particular crime and the particular offender*. If the jury recommends the death penalty, this court must review *each* of the two separate jury findings.

Here, the supported finding of the commission of aggravated arson fulfilled the requirement of C.Cr.P. Art. 905.3 and the review requirement of Supreme Court Rule

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when only one statutory aggravating circumstance found by the jury is supported by the evidence.

Finally, the use of statutory aggravating circumstances, which was approved in *Gregg v. Georgia*, above, as a method of channeling the jury's discretion in the determination of which first degree murderers are "death eligible", is particularly important in a capital sentencing scheme in which any intentional murder may be a capital offense. Unlike the Georgia statutory scheme (in which proof of a statutory aggravating circumstance in the penalty phase is a crucial consideration in the jury's determination of which first degree murderers should be punished by death), Louisiana's present capital sentencing procedure requires (as noted in Footnote 12) the finding of an aggravating circumstance in the guilt phase of the trial, and the class of murders for which the death penalty will even be considered by a jury has already been significantly narrowed by the Legislature as a method of guiding sentencing discretion. Under the present law, many first degree murders in Georgia would be second degree murders in Louisiana.

28, § 1(b) regarding a supported finding of the existence of at least one aggravating circumstance. The effect of a determination by this court that the evidence did not support the finding of an *additional* aggravating circumstance is a question which is more pertinent to the review of the jury's second finding – that is, the finding regarding the appropriateness of the death penalty for this particular crime and this particular murderer. We will address that question in the context of a discussion (in the next subsection) of whether evidence, which was offered in support of an unproved aggravating circumstance, introduced an arbitrary factor into the penalty phase which misdirected the jury's sentencing discretion.

Passion, Prejudice or other Arbitrary Factors.

The evidence offered in support of the unproved aggravating circumstance in this case consisted of the official records of the Arkansas circuit court and prison pertaining to defendant's conviction of involuntary manslaughter. Defendant objected to this evidence on the basis (1) that the documents were hearsay and were not properly authenticated and (2) that evidence of the indictment for second degree murder was inadmissible because only evidence of the conviction was admissible.

A review of the record reflects that the documents were properly certified and were also authenticated by the testimony of the deputy prosecuting attorney. They were identified as properly certified copies of original documents, which were official records of the circuit

court and of the Arkansas State Prison.¹⁴ We therefore conclude that admission of the records was not barred by the lack of authenticity or by hearsay rules.¹⁵

Defendant's second ground for objection raises the question of what evidence is admissible in the penalty phase of the trial. C.Cr.P. Art. 905.2 declares that the hearing shall focus on the circumstances of the offense and propensities of the offender, but does not provide any specific rules regarding the admissibility of evidence at this unique type of hearing. At a sentencing hearing in a noncapital case (in which the judge will determine the sentence), many of the usual rules of evidence do not apply, because the postconviction focus on the appropriateness of sentence is vastly different from the preconviction focus of guilt or innocence. See *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949),

¹⁴ As this court said in *State v. Nicholas*, 359 So.2d 965 (La. 1978):

"Generally, if an official writing is proved to come from the proper office where such documents are kept, the document will be authenticated as genuine by the certification of the custodian because of the presumption that he will carry out his duty to receive, record and certify only genuine official papers and reports." 359 So.2d at 969; see also 7 J. Wigmore, *Treatise on Evidence* §§ 2158-2159 (3d ed. revision 1940); McCormick, *Law of Evidence* § 224 (2d ed. 1972).

See also R.S. 15:457 and R.S. 15:529.1.

¹⁵ Compare *State v. English*, 367 So.2d 815 (La. 1979), in which this court reversed a death sentence because the state failed properly to authenticate certain documents offered at the penalty trial.

which was cited in *Gregg* for the proposition that in "the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender". 428 U.S. at 189, 96 S.Ct. at 2932.

The instant case presents the question of whether evidence of a prior unrelated conviction of involuntary manslaughter (which clearly is relevant to a focus on the character and propensities of the offender) is admissible in the prosecution's case in chief, before the defendant takes the stand or otherwise puts his character at issue.¹⁶ In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court, although not specifically addressing the issue, approved a capital sentencing procedure in which any relevant evidence may be introduced in the penalty phase *after* the offender has been found guilty under a statute (similar to Louisiana's present statute) which defines first degree murder to require the finding of an enumerated aggravating circumstance as an essential element of the offense.¹⁷ The Court did not discuss the

¹⁶ The usual prohibition against a jury's hearing evidence of other crimes, when such evidence tends merely to show a defendant's bad character, is not applicable in the penalty phase of a capital trial, because (unlike the guilt phase) the inquiry is designed to focus on defendant's character.

¹⁷ In *Jurek*, the court noted:

"While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the

scope of evidence admissible in the penalty phase, but relevance obviously cannot be the sole criteria for determining admissibility. It is logical that the offered proof should also conform to the other *applicable* rules of evidence and that procedural safeguards for fairness (such as notice) must be considered in determining admissibility.

We will not attempt in this decision to lay down detailed rules for admissibility of evidence in the penalty phase, but will address the issue only insofar as it is necessary to decide this case.

We hold that the evidence of the prior unrelated conviction of involuntary manslaughter was properly admitted, although the conviction did not qualify as an unrelated murder under C.Cr.P. Art. 905.4(c) and although defendant did not take any steps to place his character at issue. In the penalty phase of a capital case, the defendant's character is at issue and indeed is one of

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categories of murders for which a death sentence may ever be imposed serves much the same purpose.* * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option – even potentially – for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.”

the principal issues.¹⁸ In this particular case, the evidence of the prior conviction not only was extremely relevant, but also was competent and highly reliable. Moreover, defendant was apparently prepared to meet the evidence and in fact did so with testimony rebutting or explaining the official record's factual statement which served as the basis for acceptance of the plea. We therefore conclude that the evidence of the conviction was properly admitted and did not constitute an arbitrary factor which improperly influenced the jury's sentencing discretion.

As to the evidence of an initial indictment for second degree murder (in the same incident), there was extensive testimony from both defendant and his sister concerning defendant's version of the incident. Even if the fact of an indictment for a greater offense (than the one to which defendant eventually pleaded) should have been excluded, the gravamen of the evidence was a presentation of the facts of the occurrence, and admission of the indictment was certainly not reversible error.

¹⁸ The prosecution arguably should be allowed to affirmatively negate the mitigating circumstances that defendant “has no significant prior history of criminal activity”. C.Cr.P. Art. 905-5(a). If the prosecutor cannot introduce evidence of prior convictions in the case in chief during the penalty hearing, and the defendant introduces no character evidence, then the jury might be misled into believing that the existence of the mitigating circumstances has been proved by the absence of evidence.

Although the penalty hearing is to be conducted according to the *applicable* rules of evidence, the usual prohibition against the prosecution's initiation of the inquiry into defendant's character is simply not applicable in the penalty phase, where the focus on character is one of the statutory means of channeling the jury's sentencing discretion.

There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. *State v. Willie*, 410 So.2d 1019 (La.1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See *State v. Lindsey*, 404 So.2d 466 (La.1981), and *State v. Willie*, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the "living death of life imprisonment", which implied that defendant could never be released.¹⁹ Had the prosecutor done

¹⁹ The only reference in closing argument to the possibility of pardon was:

"The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it related to Robert Sawyer because it's not."

more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations.²⁰

We also note that the prosecutor commented on Lane's conviction and sentence to life imprisonment. In response to defense counsel's beyond-the-record comment that Lane was sentenced to life (a fact not previously revealed to the jury) and to the suggestion that defendant should receive the same sentence, the prosecutor retorted by arguing (also beyond the record) that he had handled Lane's case and that there were aggravating circumstances present in defendant's case which were not present in Lane's case.

A strong admonition by the trial court, in which he instructed the jury not to consider the comments of either

²⁰ Prosecutors tread on dangerous ground by mentioning the availability of pardon. Even though such a remark is accurate, it has little relevance to the penalty determination, except to give the jury a complete picture of the overall scheme for punishing first degree murderers (and perhaps to correct inaccurate defense statements or implications that a murderer under sentence of life imprisonment can never be released from prison).

counsel regarding Lane's case, effectively prevented prejudice. The jury was clearly given the impression that defendant's case must be evaluated on its own merits, without regard to the sentence imposed on his original co-defendant.

Proportionality and Excessiveness of Sentence

Section 1, subsection (c) of Rule 28 requires this court to extend its review beyond the evidence submitted to the jury. We must, in effect, decide whether the jury's recommendation of the death sentence was disproportionate, reviewing both the facts presented to the jury and the other materials submitted to us on review. We must consider the recommendations of juries in similar cases (from the judicial district), as well as the character of the defendant and the nature of his crime.

This is the sixth death sentence recommended by a jury in Jefferson Parish since 1976. It is only the third death sentence from that parish which we have upheld.²¹ In one other case of a death sentence, we remanded for

²¹ In *State v. Berry*, 391 So.2d 406 (La.1980), we affirmed a recommended death sentence in a Jefferson Parish case in which the murderer intentionally killed a deputy sheriff during an aborted bank robbery. And in *State v. Johnny Taylor*, 442 So.2d 109 (La.1982), decided this day, we affirmed the death sentence in a case in which the murderer lured the victim from his home at night on the pretext of buying the victim's used automobile, stabbed the victim 20 times, and locked him alive in the trunk of the car, where he was left to die.

further evidentiary determinations.²² In another, we remanded for a new penalty trial due to procedural flaws in the initial proceedings.²³ In one other case, the death penalty was set aside because of improper closing argument.²⁴

As required by our rules, the district attorney has submitted information concerning all first degree murder prosecutions, including a brief description of the offense, the offender, and the disposition. A review of those cases illustrates the adage that no two cases are alike. (A brief description of each is included as part of an unpublished appendix.) In some, offenders, while engaged in robberies or burglaries, killed their victims or others who interrupted the commission of their crimes. In others, offenders killed out of anger at or hatred for the victim. In two cases, women were convicted for their part in schemes to kill their spouses.

The only thing which seems clear from a review of the cases presented to Jefferson Parish jurors is that they appear to recommend death in relatively few cases and only in those of an egregious nature. Certainly this case fits that description. Never before has this court has presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here. After administering a savage beating, defendant sat comfortably listening to records, while his tormented victim lay dying before his eyes. Although defendant attempted to show that Lane was the principal aggressor, the jury

²² See *State v. Smith*, 400 So.2d 587 (La.1981).

²³ See *State v. Lindsey*, 404 So.2d 466 (La.1981).

²⁴ *State v. Jimmy Robinson*, 421 So.2d 229 (La.1982).

obviously credited Ms. Shano's account which placed primary emphasis on defendant's role in Ms. Arwood's excruciatingly painful and lengthy ordeal. The jury obviously believed that he was principally responsible for urging Lane to participate in killing a woman who was virtually a perfect stranger to Lane.

Moreover, the superficial disparity between the sentences imposed on Lane and on defendant quickly disappears when one evaluates the culpability of the two men in this incident, as well as their individual backgrounds. Neither of the two juries, which separately heard the cases and made the recommendations, acted unreasonably. Two participants in the same murder can easily be viewed very differently for penalty purposes.²⁵

This murderer, a mature man of almost 30, was not under the domination of any other human being, nor did he play a minor role in the brutal slaying. Furthermore, unlike Lane, he had previously killed a helpless, weaker human being. His case is easily distinguishable from Lane's.

Defendant's only endeavor to present factors in mitigation was his presentation of his own version of the

²⁵ See, for example, the cases involving the two Sonnier brothers, in which they kidnapped and murdered a young couple after raping the girl. This court eventually affirmed the death sentence for the older brother, who had a serious criminal record. See *State v. Sonnier*, 402 So.2d 650 (La.1981). However, this court concluded death was excessive for the younger brother, who acted under the influence and domination of his older brother and whose role in their crime was "relatively minor". See *State v. Sonnier*, 380 So.2d 1 (La.1979).

child's death and his heartrending account of a pitiful, deprived childhood. While the factors were properly considered by the jury and must be considered on appeal, they pale into insignificance when faced with the horrendous offense committed against a helpless young woman.

The value which society places on human life has led the Legislature to enact severe penalties for the unjustified killing of a human being. That same concern for the intrinsic worth of the life of the accused has also led courts and legislatures to erect carefully designed procedures which must be scrupulously followed before an accused's life may be taken by the state for his crime.

This court's function in reviewing a death penalty recommendation by a jury is not to sit as a subsequent sentencing panel, but to insure that the jury's recommendation was not influenced by arbitrary factors or improper considerations. The jury in this case was unanimously convinced beyond a reasonable doubt that defendant committed first degree murder and that the circumstances warranted the imposition of the maximum penalty which may be imposed. We are convinced, on review of the record, that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning that recommendation on appeal.

Accordingly, defendant's conviction and sentence are affirmed.

DIXON, C.J. and DENNIS, J., concur with reasons.

CALOGERO, J., concurs for reasons assigned by DIXON, C.J.

DIXON, Chief Justice (concurring).

I respectfully concur.

C.Cr.P. 905.2 is ambiguous. We should not interpret it to permit the introduction of "character and propensit[y]" evidence except "according to the rules of evidence." C.Cr.P. 905.2. Here, however, the error of permitting evidence of bad character before character is placed at issue by defendant was harmless beyond reasonable doubt.

DENNIS, Justice, concurring in the result.

I concur in the result but strenuously disagree with the majority's unabashed disregard of the law and rules of evidence governing capital sentence hearings.

Code of Criminal Procedure article 905.2 clearly provides that "[t]he hearing shall be conducted according to the rules of evidence" and that "[e]vidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue." This plainly indicates that, except for evidence relative to aggravating and mitigating circumstances, the introduction of character evidence is governed by the rules of evidence, including the statutory rules set forth by R.S. 15:479-83. Of these R.S. 15:481 and 483 are most pertinent here: § 481 "The state is permitted to introduce testimony of the bad character of the accused only in rebuttal of the evidence introduced by him to show good character." § 483 "No other investigation into the character of a witness is permissible except such as affects his credibility." These rules plainly state that a defendant's character cannot be attacked until he puts it at issue by

the introduction of good character evidence or by taking the witness stand. Our law contains also a great many jurisprudential rules, not the least important of which are the rules adopted by this court in *State v. Prieur* 277 So.2d 126 (La.1973), to guarantee due process of law and relevance in the introduction of other crimes evidence.

The majority is completely wrong in stating that art. 905.2 does not provide any specific rules regarding the admissibility of evidence at a capital sentence hearing. Art. 905.2 clearly states that the hearing shall be conducted according to the "rules of evidence" which obviously include those laws previously enacted by the legislature and probably encompass those rules previously adopted by this court. As any evidence scholar knows, the legislature has not yet enacted a comprehensive evidence code and our body of that law is inadequate and unworkable without the jurisprudentially developed rules.

In truth, the majority has ignored the sentencing procedure enacted by the legislature and is attempting to fashion a procedure more to its liking. Apparently, the majority prefers the procedure that was adopted by Texas as described by the Supreme Court in *Jurek v. Texas* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In a *Jurek* sentence proceeding, the jury is nearly always asked to make a finding on only one question not already answered at the guilt trial. That is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." See Black, *Capital Punishment, the Inevitability of Caprice and Mistake* 115 (2d ed. 1981). When this is the crucial question, perhaps a wide-open-no-

holds-barred procedure, allowing any and all bad character evidence from the word go, is appropriate. But the Texas Jurek proceeding is quite different from the procedure established by Louisiana law under which the jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists, and weigh against it any mitigating circumstances, before it may go on to unanimously recommend a sentence of death. Regardless of which procedure in our personal opinions is wiser, fairer, or more just, this court has no legitimate power to usurp the plenary will of the Legislature and reshape the statutory system according to its own specifications.

I find it quite disturbing also that the majority seeks to support its disregard of the law and rules of evidence by implying that there is no essential difference between a capital sentencing by a jury and a noncapital sentencing by a judge. Is the majority implying that this court considers the solemn protections with which the legislature earnestly has surrounded the imposition of our most severe penalty to be meaningless technicalities? That "many of the usual rules of evidence do not apply" even though the Legislature has said they must? If so, the majority's cavalier attitude toward the law enacted by the Legislature and the extremity and permanence of capital punishment is appalling.

The majority opinion is very unclear as to what "procedural safeguards . . . (such as notice)" will be required in penalty hearings. See p. 103. It is hoped that the majority intends to apply the Prieur guidelines to capital punishment proceedings. It would seem that in the sentencing phase of a capital case most of all, a defendant is

entitled to notice, fairness and due process and should not lose his life because of surprise or the lack of a fair opportunity to meet the evidence against him. Yet, the majority has said in footnote 16 that the "usual prohibition" against other crimes evidence is "not applicable in the penalty phase of a capital trial." Its reference on page 103 to the "*applicable* rules of evidence" is robbed of any meaning by the rest of the opinion which seems dedicated to doing away with rules of evidence in sentencing hearings.

In my opinion, the character of the defendant is not generally at issue ab initio in a capital sentencing hearing. Evidence relevant to an aggravating or mitigating circumstance is admissible throughout the proceeding. Unless it fits within this category, however, bad character evidence, including other crimes evidence, is admissible against the defendant only according to the rules of evidence. The opening sentence of C.Cr.P. art. 905.2, which states that the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender does not vitiate the meaning of the great number of detailed provisions which follow it. "Focus," when used as a verb means to concentrate or to converge. The introductory statement that the hearing shall concentrate on the defendant's character among other matters is not equivalent to saying that all character evidence shall be admissible. The remaining provisions of Art. 905.2 et seq. tell exactly how the hearing shall focus or concentrate on its subjects, and basically that is by following the rules of evidence, except that the introduction of all evidence relevant to aggravating or mitigating circumstances is permitted.

Additionally, I do not consider myself bound by any of the footnotes in the majority opinion. *Footnotes numbers 12 and 13* particularly appear to be entirely unnecessary and seem to reach out to decide issues not before us. The statement that the finding of guilt "automatically" constitutes a finding of an aggravating circumstance in the penalty hearing is contrary to law. The jury must independently find at least one aggravating circumstance *during the sentence hearing* before it may consider the death penalty. C.Cr.P. art. 905.3. The elliptic statements regarding: *Zant v. Stephens*, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), and its possible relationship to our law are unclear, unwise, and unnecessary. *Footnote Number 16* is an outright perversion of the law. It flatly states that the prohibition against other crimes evidence is not applicable in a penalty phase. Again, C.Cr.P. art. 905.2 clearly indicates to the contrary. It says that evidence relative to aggravating and mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue, which clearly indicates that outside this exception, the state cannot introduce such evidence until the defendant places his character or credibility at issue "according to the rules of evidence." *Id.*

Nonetheless, I concur in the result. I agree with the Chief Justice that the errors in introducing the bad character evidence were harmless beyond a reasonable doubt. I also concur only in the result for the additional reasons that I find the conviction of guilt be supportable on a different basis than the majority and consider that another error in the penalty phase was also harmless error.

The first degree murder conviction is justified by the evidence which in my opinion proves that the defendant was a principal to the perpetration of aggravated rape during the criminal transaction.

The death penalty is warranted because the offense was committed in an especially heinous, atrocious, or cruel manner. Although I am uncertain that the evidence supports a finding that the offender was engaged in the perpetration of aggravated arson, and I am troubled by the jury's failure to find the perpetration or attempted perpetration of aggravated rape as an aggravating circumstance, I ultimately conclude that any error committed by the jury during the penalty hearing was harmless. This crime was so horrible and involved such pitiless and needless torture of the victim that I am convinced beyond a reasonable doubt that the jury would have recommended the death penalty even if it had been informed that the evidence was insufficient to justify findings that the offender was engaged in the perpetration of aggravated arson or had previously been convicted of an unrelated murder.

I agree with the majority's statement at p. 106 of its opinion that this court does not sit as a subsequent sentencing panel. But a word of caution is necessary. By this, we do not mean that we have abandoned our constitutional function of reviewing death sentences to see if they constitute cruel, unusual or excessive punishment under the circumstances of the case. What is meant is that we do not formulate or impose sentences; we either affirm them or reverse them.

LEMMON, Justice, concurring in denial of rehearing.

On application for rehearing, defendant contends that the admission of evidence of nonstatutory aggravating circumstances violated his constitutional right by injecting arbitrary factors into the jury's exercise of sentencing discretion.

Evidence of defendant's prior conviction of involuntary manslaughter, although not constituting proof of a prior conviction of an unrelated murder, was admissible to prove the statutory aggravating circumstance that defendant had a substantial past history of criminal activity. C.Cr.P. 905.4(c). Competent evidence of a criminal conviction is clearly admissible in this regard, and such evidence is highly relevant to the central focus of the sentencing hearing on the character and propensities of the offender. C.Cr.P. Art. 905.2.

Moreover, C.Cr.P. Art. 905.2's provision that the sentencing hearing "shall be conducted according to the rules of evidence" obviously refers to the *applicable* rules of evidence. While R.S. 15:481 and 483 would have been *applicable* to exclude evidence of defendant's character in the guilt phase of the trial, those statutes are simply not *applicable* rules of evidence in the sentencing phase. The purpose of R.S. 15:481 and 483 is to insure that a *conviction* is based on the accused's guilt, rather than on his bad character. But once guilt has been validly determined, the purpose of those statutes has been served, and the statutes should not be applied to exclude competent evidence of bad character, when the focus of the hearing itself puts the defendant's character at issue. C.Cr.P. Art. 905.2. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, above.

STATE of Louisiana

v.

Robert SAWYER.

No. 81-KA-1566

Supreme Court of Louisiana.

Feb. 10, 1983.

In re: Robert Sawyer, applying for Stay of Execution,
Parish of Jefferson, No. 79-2841.

ORDER

The foregoing motion considered:

IT IS ORDERED that Execution of Robert Sawyer by the State of Louisiana, the Department of Corrections, and any other Department, agent or servant of the State of Louisiana, presently set for March 8, 1983, be and the same is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari.

463 U.S. 1223, 77 L.Ed.2d 1407

**Robert SAWYER, petitioner, v.
LOUISIANA. No. 82-6263.**

Case below, 422 So.2d 95; 427 So.2d 438.

July 6, 1983. On petition for writ of certiorari to the Supreme Court of Louisiana. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Louisiana for further consideration in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Opinion on remand, 442 So.2d 1136.

Supreme Court of Louisiana.

Robert SAWYER

v.

STATE of Louisiana.

No. 81-KA-1566.

Nov. 28, 1983.

Rehearing Denied Jan. 6, 1984.
Certiorari Denied April 2, 1984.
See 104 S.Ct. 1719.

BLANCHE, Justice.

Defendant was convicted of first degree murder and subsequently sentenced to death. The conviction and sentence were affirmed in *State v. Sawyer*, 422 So.2d 95 (La.1982). Defendant applied for a writ of certiorari to the United States Supreme Court, on the ground that evidence of another crime not considered a statutory aggravating circumstance was admitted at the sentencing, thereby injecting an arbitrary factor into the jury's decision making process. The Supreme Court, ___ U.S. ___, 103 S.Ct. 3567, 77 L.Ed.2d 1407 remanded the case to this court for consideration in light of the holding in *Zant v. Stephens*, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

FACTS

The gruesome and depraved facts surrounding this case were given a thorough treatment in the court's previous opinion. See *Sawyer*, 422 So.2d 95 (La.1983). Therefore, we give only a brief recitation of the circumstances

leading to defendant's conviction. On September 29, 1979, Fran Arwood was at the residence of defendant, where she was helping to care for the young children of defendant's live-in girlfriend. Defendant and a friend, Charles Lane, attacked Ms. Arwood, striking her repeatedly in the face. Thereafter, the two men proceeded to torture the victim by first dunking her body into scalding water, then beating her and ultimately, setting fire to the victim's genitalia with lighter fluid. The testimony of Ms. Shano at trial also indicated that, at some stage, the victim was raped. After this savage attack, defendant and Lane left the mortally wounded victim on the floor of the house until relatives of Ms. Shano arrived later in the day.

Both defendant and Lane were indicted for first degree murder. Lane was tried separately and sentenced to life imprisonment. *State v. Lane*, 414 So.2d 1223 (La. 1982). Defendant was convicted by a unanimous jury, which then proceeded to sentence defendant to death.

At the sentencing hearing, the State reoffered evidence presented in its case in chief to establish that defendant had murdered the victim while the perpetration of aggravated arson and aggravated rape, and that defendant had murdered the victim in an unusually cruel manner. Additionally, the State called a deputy prosecutor from Arkansas, who introduced documentary evidence that defendant had pled guilty to involuntary manslaughter of a four-year old child, and had served one year in prison as a result. Afterwards, defendant testified about the guilty plea and his version of the event leading to the child's death. Both defendant and his sister offered mitigating testimony as to defendant's brutal

childhood and one time institutionalization at a state mental health facility.

Upon hearing all the evidence, the jury announced its finding of three statutory aggravating circumstances: (1) that defendant was engaged in the perpetration of aggravated arson; (2) that the offense was committed in an especially heinous, atrocious and cruel manner; (3) that defendant was previously convicted of an unrelated murder and sentenced defendant to death. On appeal, this court found that the last aggravating circumstance was not supported by the evidence, 422 So.2d at 101, but correctly observed that only one aggravating circumstance need be found in order to place defendant in the category of offenders capable of receiving the death penalty. Defendant, however, argued that introduction of testimony relating to the manslaughter plea was improper, since it was neither admissible as an aggravating circumstance in the guilt phase of the trial, nor as other crimes evidence in the sentencing phase where defendant had not previously placed his character at issue. In upholding the admission of the testimony, this court found that Louisiana C.Cr.P. art. 905.2 allowed the evidence to be considered to show defendant's bad character, reasoning that defendant's character is put at issue by the nature of the proceeding, regardless of whether he takes the witness stand on his own behalf and places his character at issue.

ISSUE

On remand, we are asked to consider our previous holding in light of *Zant v. Stephens*, ___ U.S. ___, 103 S.Ct.

2733, 77 L.Ed.2d 235 (1983). In that case, the U.S. Supreme Court affirmed the constitutionality of a Georgia sentencing statute, finding that the invalidity of several aggravating circumstances found by the jury did not impair the death sentence in the case. Based upon our reading of *Zant*, we frame the following issues for resolution: (1) Under the Louisiana statutory scheme, does the finding of an additional aggravating circumstance that is later found invalid have any affect on the jury's sentence determination, where evidence of the invalid circumstance was otherwise admissible? (2) Was evidence of the invalid aggravating circumstance admissible in the instant case to show defendant's character, where defendant had not first placed his character at issue? (3) If inadmissible, was the evidence so consequential that it injected an arbitrary factor in the jury's decision to sentence defendant to death?

THE STATUTORY SCHEME

Louisiana's capital sentencing procedure, La.C.Cr.P. arts. 905-905.9, is similar in many respects to the Georgia procedure examined in *Zant*.¹ As in Georgia, the trial of

¹ The Georgia sentencing procedure was explained in detail by the Georgia Supreme Court in response to the U.S. Supreme Court's certified question in *Zant*, 250 Ga. 97, 297 S.E.2d 1 (1982). Essentially, the Georgia System is divided into three planes:

- I. Ga.Code Ann. § 26-1101 separates those homicide cases which fall into the category of murder. This is an issue of fact determined during the guilt phase of the trial.

(Continued on following page)

an individual charged with first degree murder is bifurcated; consisting of a guilt phase and a penalty phase. During the guilt phase of the trial, the jury must make the initial determination whether the defendant belongs in the class of offenders who *may* be exposed to the death penalty. La.R.S. 14:30 provides that in addition to specific intent to kill a human being, the offense must include one of four aggravating circumstances.² Once the defendant

(Continued from previous page)

- II. Ga.Code Ann. § 27-2534.1 provides that unless at least one aggravating circumstance is found, the death penalty may not be imposed in a given murder case.

- III. Once it is determined that the death penalty may be imposed, the fact finder determination takes into account all relevant evidence in mitigation or aggravation, and vests absolute discretion on the fact finder.

Superimposed on this scheme is the automatic appeal to the Georgia Supreme Court, who determines whether the penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

² La.R.S. 14:30 states:

First degree murder is the killing of a human being:

- (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(Continued on following page)

has been found guilty, the jury must then determine whether defendant will be given the death sentence.

The process of sentencing is explained in Code of Criminal Procedure Art. 905.3, which states:

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists*, and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

Clearly, then, the sentencing phase is itself broken down into two aspects. Initially, the jury must find the existence of at least one statutory aggravating circumstances before an offender can be sentenced to death. Because the aggravating circumstances listed in Article 905.4 include most of the aggravating circumstances listed in R.S. 14:30, the jury will usually have already found at least one aggravating circumstance before it reaches the penalty phase of the trial. Louisiana's scheme differs from Georgia's in this respect, for the class of offenders in Louisiana eligible for

(Continued from previous page)

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

the death penalty is considerably narrower after the guilt phase of the trial.³

Once a *single* aggravating circumstance is found, the jury may then consider all the evidence, both in aggravation and mitigation, in order to make the final determination that the offender should be put to death. The finding of additional aggravating circumstances are therefore unnecessary to advance the case to consideration of whether the death penalty will in fact be imposed. Nothing in the statutory scheme requires that the jury weigh two or more aggravating circumstances more heavily against the defendant than a single aggravating circumstance. Rather, the finding of *statutory* aggravating circumstances is

³ Under the Ga.Code Ann., murder punishable by death is defined in the following manner:

§ 26-1101 Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of a human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Clearly, then what is considered second degree murder in Louisiana would be considered murder in Georgia, subject to the death penalty.

simply a preliminary step before any balancing process can be undertaken.⁴

ADMISSIBILITY OF THE EVIDENCE

While the failure of an aggravating circumstance may not of itself impair the sentence, the introduction of otherwise inadmissible evidence in support of the circumstance could inject an arbitrary factor in the sentencing process. Defendant maintains in the instant case that inadmissible evidence was put before the jury in the form of testimony of the involuntary manslaughter conviction.

Defendant's argument is based on the language of C.Cr.P. art. 905.2, which addresses the conduction of sentencing hearings. The article provides:

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. *The hearing shall be conducted according to the rules of evidence.* Evidence relative to aggravating or mitigating

⁴ Additional protection is afforded defendant by Rule 28 of the Louisiana Supreme Court, which provides for automatic review by this court to determine if the sentence is excessive. Included in this review are inquiries into whether:

- (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; and
- (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and
- (3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Defendant contends that the second sentence of 905.2 precludes the introduction of other crimes evidence unless offered to show defendant's bad character, or to support a valid aggravating circumstance.⁵ 905.4(c) limits

⁵ Article 905.4 provides that:

The following shall be considered aggravating circumstances:

- (a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;
- (b) the victim was a fireman or peace officer engaged in his lawful duties;
- (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;
- (d) the offender knowingly created a risk of death or great bodily harm to more than one person;
- (e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(Continued on following page)

other crimes which may be considered aggravating circumstances to convictions of unrelated murders, aggravated rape, or aggravated kidnapping, or where the offender has a significant prior history of criminal activity. It does not include guilty pleas, or for that matter, convictions of involuntary manslaughter.⁶ Accordingly, defendant argues that he has not placed his character at issue by taking the stand, evidence of the guilty plea cannot be introduced. As further support for this proposition, defendant points to the following sentence of 905.2 – which allows for other crimes evidence to be introduced

(Continued from previous page)

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

⁶ See *State v. Antonio James*, 431 So.2d 399 (La.1983) (Blanche, J., concurring in part and dissenting in part).

regardless of whether defendant has taken the stand if it relates to the aggravating circumstances – as a limited exception to the general rules of evidence by which the hearing should be guided.

This argument was espoused by defendant when the case was originally before this court, *State v. Sawyer*, 422 So.2d 95 (La.1982). We rejected the argument then, and most recently, in the case of *State v. Jordan*, 440 So.2d 716 (La.1983).⁷ Now, after having been asked to reconsider the question, we affirm our prior holdings.

The first sentence of 905.2, which defendant ignores in his effort to expand the meaning of the second sentence, expresses the true intent of the statutory scheme. When it commands that the sentencing gearing focus on the "circumstances of the offense and the character⁸ and propensities of the offender," 905.2 makes it clear that the character of the defendant is one of the two most relevant factors with which the sentencing hearing should be concerned. As we observed in *State v. Mattheson*:

The above article clearly provides that the focus of the sentencing hearing is on "the character and propensities of the offender" as well as the circumstances of the offense and that evidence of "aggravating or mitigating circumstances" are relevant *irrespective* of whether defendant places his character at issue.

407 So.2d 1150, 1164 (La.1981). In *State v. Jordan*, we stated that "it is axiomatic that the conviction per se puts

⁷ The opinion was authored by Judge Julian Bailes, sitting for Justice Marcus.

⁸ Emphasis added.

the convicted offender's character at issue" 440 So.2d 716, 720 (La.1983). At the heart of such a statement rests the underlying difference between the uses of character evidence at the guilt and sentencing phases of a trial. The rules of evidence prohibit the use of character evidence where defendant has not placed his character at issue for the simple reason that such evidence is not relevant to the issue of guilt. To the contrary, in a sentencing hearing, the jury is asked to scrutinize defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed.

We are of the opinion that the reference to the rules of evidence contained in Article 905.2 was placed there to regulate the introduction of competent versus incompetent evidence, and should not be construed to prohibit introduction of highly relevant character evidence at the sentencing hearing.⁹ Thus, we conclude that the evidence of defendant's guilty plea to involuntary manslaughter of a four-year old child was properly admitted to show defendant's character.

⁹ In a concurring opinion to *Jordan*, J. Lemmon noted the absurd result of applying the other crimes rule to a sentencing hearing:

"It is therefore highly doubtful that the Legislature intended for the defendant to control the decision on which evidence of his character and propensities will be introduced at the penalty hearing. Yet this is exactly what the adoption of defendant's argument would permit." *State v. Jordan*, 440 So.2d 716, at 721 (La.1983) (Lemmon, J., concurring).

ARBITRARINESS

Although we find that the evidence was admissible under Article 905.2, and thus injected no arbitrary factor into the decision process of the jury, we think that even if the evidence had been inadmissible, no serious prejudice could have resulted to defendant. Defendant has argued strenuously in his brief that the prosecutor relied heavily on the details surrounding defendant's guilty plea to manslaughter to convince the jury to return a death sentence. Regardless of whatever emphasis the prosecutor placed on the guilty plea, it is inconceivable, given the overwhelming evidence of the heinous nature of the principal offense already before the jury, that the additional evidence of the manslaughter plea could have seriously prejudiced defendant at that point.

DECREE

For the reasons assigned, we find that the failure of one of three statutory aggravating circumstances did not create an arbitrary factor in the sentencing of defendant by allowing inadmissible evidence to be considered by the jury. Therefore, the sentence of defendant is affirmed.

AFFIRMED.

CALOGERO, J., concurs. See the concurring portion of my concurring/dissenting opinion in *State v. Jordan*, 440 So.2d at 722.

DENNIS, J., concurs with reasons.

DENNIS, Justice, concurring.

I concur in the result, but I adhere to the reasoning expressed in my concurring opinion on original review. See *State v. Sawyer*, 422 So.2d 95, 106 (La.1982).

In the Supreme Court
of the United States

Robert SAWYER, petitioner,

v.

LOUISIANA.

No. 83-6258

Former decision, 103 S.Ct. 3567.

Case below, 422 So.2d 95; 427 So.2d 438; 442 So.2d 1136.

Petition for writ of certiorari to the Supreme Court of Louisiana.

April 2, 1984. Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

STATE OF LOUISIANA,
PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana No. 79-2841
VS. Division G
ROBERT SAWYER Date 5-8-84

DISTRICT ATTORNEY _____ JUDGE TIEMANN

PETITION FOR WRIT OF HABEAS CORPUS IN ACCORDANCE WITH LOUISIANA SUPREME COURT RULE XXVII WAS FILED IN OPEN COURT. HAVING EXAMINED THE FOREGOING PETITION FOR POST-CONVICTION RELIEF, WRIT OF HABEAS CORPUS, EVIDENTIARY HEARING AND STAY OF EXECUTION, THE COURT DENIED THE PETITION AND STAY OF EXECUTION.

/s/ Kathy Wright
DEPUTY CLERK

Supreme Court of Louisiana.

STATE of Louisiana ex rel.
Robert SAWYER

v.

Ross MAGGIO, Jr., Warden, Louisiana
State Penitentiary.

No. 84-KP-0919.

May 10, 1984.

In re Robert Sawyer, applying for writ of review and stay of execution to the Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 79-2841, Division G.

In view of the fact that counsel assigned by the trial judge in this capital case was not admitted to the bar for at least five years prior to trial as required by La.Code Crim.P. art. 512 and considering defendant's contentions relative to ineffective assistance of counsel, we grant the application, stay the execution and remand the case to the district court with instructions to the trial judge to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence.

 STATE OF * 24TH JUDICIAL DISTRICT
 LOUISIANA * COURT
 VERSUS * STATE OF LOUISIANA
 ROBERT SAWYER * PARISH OF JEFFERSON
 * NO. 79-2841, DIVISION "G"

JUDGMENT

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
 Catherine Hancock
 Attorneys for petitioner,
 Robert W. Sawyer;

William C. Credo, III,
 Assistant District Attorney
 for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that
 Petitioner's Writ of Habeas Corpus be, and is hereby
 DENIED.

JUDGMENT READ, RENDERED AND SIGNED in
 Open Court this 8th day of February, 1985.

/s/ M. Joseph Tiemann
 M. JOSEPH TIEMANN,
 JUDGE, DIV. "G"

(Caption omitted in printing)

REASONS FOR JUDGMENT

This matter came for hearing pursuant to a remand from the Louisiana Supreme Court to determine the effect of a violation of C.Cr.P. Art. 512, the claims of ineffective assistance of counsel, and the defendant's (petitioner's) entire application for Writ of Habeas Corpus. Of the twenty (20) claims asserted by petitioner, the Court finds that several of these claims are overlapping, and therefore, will address them by substantive issue presented therein.

Claim I

DENIAL OF DUE PROCESS AND EQUAL PROTECTION CONSTITUTIONAL RIGHTS BY APPOINTED COUNSEL WHO HAD BEEN ADMITTED TO THE BAR FOR LESS THAN FIVE (5) YEARS (C.Cr.P. Article 512)

The record reflects that Robert W. Sawyer, petitioner herein, was indicted for First-Degree Murder on December 7, 1979, and was arraigned on January 24, 1980. At the arraignment, the Honorable Charles Gaudin appointed Wiley Beevers to represent Sawyer, who entered a plea of not guilty. Mr. Beevers had, at the time of the arraignment, more than five (5) years experience at the bar. James Weidner was also appointed by the Court to assist Mr. Beevers. It has been stipulated that Mr. Weidner did not have five (5) years experience at the bar at the time of his appointment. Mr. Beevers later withdrew, and Mr. Weidner was reappointed on March 27, 1980, as sole counsel of record. Prior to trial, Mr. Weidner engaged the

services of Sam Stephens, an attorney who was two (2) weeks short of the five (5) years requirement contained in C.Cr.P. Art. 512, which states:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned an assistant counsel.

Sawyer was convicted of First-Degree Murder by a jury of twelve (12) on September 19, 1980. On that same day, the jury recommended the death penalty. For a recitation of the facts, see *State v. Sawyer*, 422 So.2d 95 (La.1982).

The issue before this Court is whether or not Sawyer's conviction should be reversed based on the technical violation of C.Cr.P. Art. 512. Irrespective of petitioner's contention that the mere violation of this article constitutes a denial of due process and equal protection of the laws, and therefore, should require a reversal, this Court is of the opinion that the legislative intent of Article 512 was to insure *effective assistance* of counsel to a defendant charged with a capital offense. Article 512 was designed, in this Court's opinion, as a safeguard against inexperienced counsel representing a defendant charged with such a serious offense. A violation of Article 512 could be viewed as a rebuttable presumption that the indigent defendant was not provided with effective assistance of counsel. However, this presumption could be

rebutted upon a showing that appointed counsel rendered effective assistance. The purpose of Article 512 would, therefore, be met when such a defendant, *in fact*, is represented by experienced counsel even though that attorney has slightly less than the requisite five (5) years admission to the bar. In this Court's opinion, the legislature suggested that competence occurs with five (5) years admission. Where competence is shown to exist, suggestion must give way to reality. In the instant case, the technical mandate of Article 512 was fulfilled when Wiley Beevers, an attorney who at the time of the time of arraignment had considerably more than five (5) years admission to the bar, was appointed as chief counsel to represent Sawyer. In accordance with said Article, James Weidner was appointed by the Court to assist Mr. Beevers. Thus, the genuine issue in this case is whether or not Mr. Weidner actually rendered effective assistance of counsel to Robert Sawyer. This issue will be more fully discussed under petitioner's Claim II. However, pretermittting this issue, respondents allege that the technical violation of Article 512 is, at most, harmless error. According to La. C.Cr.P. Article 912, "*a judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.*" The burden of proving harmless error rests upon someone other than the person prejudiced by it to show that it was harmless. See *State v. Gibson*, 391 So.2d 421 (La.1980). Thus, respondents herein must prove that the trial court's failure to appoint counsel with five (5) years admission to the bar created little likelihood that such an error would have changed the results reached by the jury. See *State v. Ferdinand*, 441 So.

2d 1272 (La. App. 1 Cir., 1983), writ denied 445 So.2d 1233. Additionally, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) that some constitutional errors may be considered harmless if the beneficiary of the error "prove(s) beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, 386 U.S. 24, 87 S.Ct. 828. After reviewing seven (7) volumes of transcripts and the record, this Court is of the opinion that the error complained of did not constitute a substantial violation of petitioner's constitutional or statutory rights, and that respondents proved, beyond a reasonable doubt, that such an error was not a contributing factor to the verdict reached. As stated in *State v. McLeod*, 6 So.2d 145 (La.1942), "While the accused is entitled to be protected against an invasion of rights guaranteed by the Constitution, these rights may not be employed on a pretext as a shield to thwart the process of justice." *Id.* at 148. As previously stated, the better inquiry is whether or not the appointed attorney, James Weidner, in fact, rendered effective assistance of counsel, which is to be examined and discussed *infra*.

As regarding petitioner's argument that there was a denial or violation of his constitutional rights to due process and equal protection, the parties have stipulated that as of August 14, 1984, the 39 Louisiana inmates on death row (other than the petitioner) were provided with appointed counsel who had the requisite five (5) years admission to the bar. Petitioner contends that based on the language contained in *Bearden v. Georgia*, ___ U.S. ___, 103 S.Ct. 2064 (1983), citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031 (1970), certain factors must be

examined and weighed in order to determine if a violation of equal protection or due process exists:

- (1) the nature of the individual interest affected;
- (2) the extent to which it is affected;
- (3) the rationality of the connection between legislative means and purpose; and
- (4) the existence of alternative means for effectuating the purpose.

It should be noted that the petitioner is not attacking Article 512 as being unconstitutional; rather, he is asserting that the trial court did not apply Article 512 in such a manner as to provide petitioner with due process and equal protection of the laws, *i.e.*, by the trial court's failure to appoint counsel with the requisite five (5) years admission to the bar.

With regard to the first element, petitioner's interest consisted of having effective counsel defend his constitutional rights in accordance with the standard espoused by the United States Supreme Court in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984), to be discussed in Claim II. The extent to which petitioner's interest was affected was, in this Court's opinion, not grave or serious enough to warrant a reversal of his conviction for the main reason that, notwithstanding his lack of five (5) years admission to the bar, Mr. Weidner rendered effective assistance of counsel. The reasons for this decision will be provided *infra*. With respect to the rational relation between the State's interest in prosecuting the petitioner in an efficacious manner and the means employed to effectuate their purpose, this Court finds that the trial

court's failure to satisfy the mandate of Article 512 does not outweigh the State's interest in protecting society and seeking justice. Lastly, this Court acknowledges that alternative means were available to the trial court, namely, appointing counsel who had been admitted to the bar for five (5) or more years.

In weighing the aforementioned factors in compliance with *Bearden, supra*, this Court is of the opinion that whatever harm, if any, that occurred to petitioner as a result of the trial court's failure to adhere to Article 512, in its entirety, the State's interest in trying the petitioner on behalf of the residents of Louisiana clearly preponderates in favor of not finding a violation of petitioner's due process or equal protection rights.

Claim II

INEFFECTIVE ASSISTANCE OF COUNSEL

By agreement between the State and the petitioner, this issue was submitted on the record, affidavits, stipulations Habeas Corpus petition and its accompanying affidavits.

The leading case for a claim for ineffective assistance of counsel in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984). As succinctly stated by the United States Supreme Court:

(a) convicted defendant's claim that counsel's assistance was so defective as to ~~require~~ reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable (sic).

Id., at ___, 104 S.Ct. at 2054. The Court further indicated that where the defendant fails to demonstrate prejudice, the alleged deficiencies in counsel's performance need not even be considered. According to *Strickland, supra*, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *id.*, at ___, 104 S.Ct. at 2070. The standard for attorney performance remains simply "reasonableness" under prevailing professional norms. Thus, based on the holding in *Strickland, supra*, a convicted defendant complaining of ineffective assistance of counsel has the burden of showing that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 104 S.Ct. at 2065.

Petitioner sets forth several grounds to support his claim that his trial counsel rendered ineffective assistance which can be grouped together:

(1) Failure to Interview Various Potential Witnesses

It was held in *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984), that "complaints of uncalled witnesses are not favored in federal habeas review. . . . and the (defendant) must

overcome a strong presumption that (counsel's) decision in not calling . . . a witness was a strategic one." *Id.*, at 282. This Court is of the opinion that given the strength of the State's case, it was probably strategic on the part of counsel not to call other witnesses who might have made inconsistent statements which would have damaged the defendant's case. Furthermore, under the standard in *Strickland*, *supra*, hindsight is not considered in testing the reasonableness of counsel's performance. Therefore, petitioner has not demonstrated deficient performance which prejudiced his defense.

- (2) *Failure of Counsel to Allow the Venire to be Informed of the Penalties for the Lesser Included Offenses of Second Degree Murder and Manslaughter.*

As stated previously, much deference is given to the strategy of counsel in preparing his defense. This Court can only speculate as to the reasons Mr. Weidner objected to the prosecutor's attempt to inform the venire of penalties for lesser included offenses. Nevertheless, petitioner has failed to show deficient performance on the part of counsel.

- (3) *Ineffective Representation at the Voir Dire Stage.*

In reviewing the transcript of the voir dire examination, it is the opinion of this Court that an attorney's intuition must be given respect when he examines potential jurors. It is common knowledge among the legal profession that "intuitive" feelings of the attorney play a large role as to whom he selects as a juror. This Court must label jury selection as "strategy" on the part of

counsel, and hold that petitioner has not proven that Mr. Weidner's conduct was not one of strategy.

- (4) *Waiver of Closing Argument During Guilt/Innocence Phase.*

It is the opinion of this Court that Mr. Weidner's choice in not giving closing arguments falls within the zone of strategy. *William v. Beto*, 354 F.2d 698, 703 (5 Cir. 1965).

- (5) *Failure to Investigate Character and Expert Witnesses as it Related to the Defense of Intoxication and Penalty Phase.*

Petitioner alleges that Mr. Weidner chose only to call three (3) character witnesses at the penalty phase, and therefore, prejudiced his chances of mitigation. This Court opines that Mr. Weidner's strategy in not calling more witnesses to attest to the character of the petitioner was probably to the latter inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215 (5 Cir. 1984):

(r)epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

Id., at 217. Thus, petitioner has failed to show that he was prejudiced. Petitioner further contends that the two psychiatrists called with regard to the intoxication defense were not offered by Mr. Weidner as experts in the field of alcoholism. A review of the transcripts show that both doctors were given hypothetical questions to a situation where an individual consumes a considerable amount of alcohol, and then commits the acts of which petitioner was accused. The opinion of one psychiatrist was that the person was suffering from a toxic psychosis secondary to

alcohol. The other psychiatrist testified on direct that the petitioner probably had a sociopathic personality. It is the opinion of this Court that Mr. Weidner's examination was both effective and meaningful considering the strength of the State's case, and that any errors he may have committed with regard to his examination was not sufficient to prejudice the petitioner's defense.

(6) *Failure of Counsel to Inform Defendant of his Right to Testify.*

Petitioner's Claim III, concerning his denial of the right to decide whether or not to testify, will be addressed here insofar as it bears on the issue in ineffective assistance of counsel. After reviewing the record, affidavits and stipulations, this Court finds no evidence whatsoever to support petitioner's allegation that he was not informed by counsel of his right to testify. Therefore, this claim is without merit.

(7) *Failure of Counsel to Object to Remarks Made by the Prosecutor not in Evidence.*

Even should this omission by counsel be considered as unreasonable or below the standard enunciated in *Strickland, supra*, petitioner has failed to prove prejudice sufficient to undermine the confidence in the outcome.

In light of the *Strickland, supra*, holding, petitioner did not meet his burden of proving that counsel's performance was deficient, and that such performance prejudiced the petitioner so seriously that he was deprived of a fair trial. In summary, petitioner has failed to show a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would have had a reasonable doubt respecting his guilt. *Murray v. Maggio*,

736 F.2d 279 (5 Cir. 1984). This Court notes that not only was Mr. Weidner's representation "reasonable" given the totality of the circumstances, he demonstrated a remarkable ability to defend his client in light of the enormous amount of evidence in the hands of the prosecution. Truly, he demonstrated wisdom beyond his years.

Claim III

FAILURE OF COUNSEL TO INFORM PETITIONER OF HIS RIGHT TO TESTIFY

This issue was addressed under Claim II(6), *supra*.

Claims IV - XX

In his petition for habeas corpus, petitioner also claims that his conviction, or in the alternative, his death sentence, should (sic) be vacated because of a host of other errors. This Court has exhaustively studied the record, the transcripts, affidavits and stipulations in connection with petitioner's claims, and believes that those other claims are so seriously lacking in merit that no reasonable jurist could come to a conclusion that is different from the conclusion reached by the Louisiana Supreme Court. *Barefoot v. Estelle*, ___ U.S. ___, 103 S.Ct. 3383, reh. den. 104 S.Ct. 209 (1983). As to these other claims, petitioner has not made a substantial showing of the denial of a constitutional right, recognized by either the State or Federal Constitution. Accordingly, all of petitioner's remaining claims are rejected by this Court.

For the reasons stated hereinabove, petitioner's claims for post-conviction habeas corpus relief are denied.

GRETNA, LOUISIANA, THIS 8th DAY OF February,
1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

Supreme Court of Louisiana.

STATE of Louisiana ex rel.
Robert SAWYER

v.

Ross MAGGIO, Jr., Warden, Louisiana
State Penitentiary.

No. 85-KP-0660.

May 13, 1985.

PER CURIAM.

In our previous order we instructed the district court to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence. 450 So.2d 355 (La.1984). The parties and the district court misconstrued our order of an evidentiary hearing as being limited to the issue of whether counsel was ineffect because he had not been admitted to the bar for at least five years. Our concerns were not so limited, however, and we now remand the case for an evidentiary hearing on all of the defendant's allegations of ineffective assistance of counsel during the preparation, trial and penalty phase of his case.

WRIT GRANTED; CASE REMANDED FOR EVIDENTIARY HEARING.

LEMMON, J., concurs. This Court's determination of relator's claim may turn on evidence regarding defense counsel's waiver of closing argument during the guilt phase.

24TH JUDICIAL DISTRICT,
PARISH OF JEFFERSON
STATE OF LOUISIANA

Louisiana v. Robert Sawyer

Docket No. 79-2841

* * *

[186] THE COURT: No, I'm really trying -

MR. CREDO: And I believe that the proper compromise to the State's position and petitioner's position is that the Court can render a written judgment today, if it desires, saying that the petition is denied, and the stay is maintained until such time as the transcript of these proceedings is filed, which will give the petitioner approximately -

THE COURT: What I don't want to do is have to go through and cause again the Supreme Court to go that extra, they are burdened enough. I really think I'm going to let the ruling stay, and let's do that. Follow your suggestion. We'll not tamper with the stay order. We will deny the petition. That way, if they say well, I went beyond what they intended, so be it, certainly all right. But if I did not rule, and they say, "well, we are waiting on a ruling from the trial court." Then there would be a further unduly delay. So, the ruling is that the petition is denied.

MR. CREDO: Does the Court wish to dictate its reasons for the denial into the record?

THE COURT: [187] What I would like to do is - again, the reasons are similar to what was reasoned earlier in the written reasons for the denial. I am as convinced as ever, in some areas even more convinced,

having heard the statements and testimony of witnesses that what we had in this case, which Mr. James Weidner of this Parish defended Mr. Robert Sawyer, that we had a mature and reasoned, and in some ways seasoned certainly beyond his physical years, for the defense of this gentleman.

Was the defense successful, of course, it was not. I mean that is obvious. We wouldn't be here today if it was successful. He would be free somewhere in Tennessee, or somewhere else.

Was it lacking? Someone once said, you know, "Even Homer nods", which means that he fell asleep one night and didn't complete a paragraph, or a sentence, or left a dangling participle. This is an imperfect world.

We had a man who is an acknowledged and accepted expert saying. "I would have done this differently, but there are exceptions in each rule."

I am as convinced as ever, as I say in some areas more convinced, maybe I did detect, shall I call it a weakness in the defense that I was not privy to, or aware of before, but on [188] balance, on balance I cannot imagine a better defense. Would it have been different? Of course, we all do things differently.

Mr. Weidner's testimony, for example, as to why he chose not to give that closing argument, it was reasoned and well reasoned out. The question here is was the defense adequate? He said he was very familiar with the trial tactics of Mr. Boudousque. It has been alleged that certain law enforcement officers have good guy and bad guy type things. One guy strenuously interrogates, and

when he leaves, the defendant, or the person being questioned, is breathless and afraid. Another officer comes in and says "Hi, how are you doing?" He says "How am I doing?" He says "That man just threatened to take my head off with his left foot." That is - "You got to be joking, that is a mean thing to do. Tell me all about it."

Apparently, this was thought to be the tactic of Mr. Boudousque. "Hi, ladies and gentlemen, we're here today. We have five elements. I think I have got them all. Well, that is about it. Thank you so much." And then when the defense lawyer gets up and says this, this, and this, then he says, "This is preposterous, I can't stand the quiet no longer", and just thunder away. I'm just conjecturing because I have never been in a case with Mr. [189] Boudousque.

But my point is that these things were not done in a cavalier fashion, not done without some reasoning. In fact, it was charming in a good sense of that term, that Mr. Weidner stated, and I'm sure just a small amount of blushing, that he practices his speech in front of his bathroom mirror. He had apparently, and this Court feels, a feeling of, how shall I say it, it's a dedication I guess is the term I am searching for, to this cause. He was espousing at the time, namely, the proper and best defense he could to Mr. Sawyer.

It's interesting, and I note this again, I guess it's a question of style. Mr. Beevers was so convinced that the man had little or no chance to succeed at a trial on the matter, that he sought additional help from a man more wise in his experience, by his own admission, he said "Go

to the defendant and beg and plead with him", do this and this. And this is the best you can do.

Mr. Beevers apparently was so upset at this rejection that he chose to ask to have the Court allow him to withdraw from the case. I am sure that Mr. Weidner, had he been apprised of this, knowing of this, still having put his hands to the plow, kept along the furrow. He plowed as straight as he could.

[190] I think the question is did he turn his back and say "See you later." He hung with it to the end. Was he successful, no. Was he correct, who knows. Everybody has a different style, in my opinion. But these are my rambling reasons.

The man did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say "You have to have been in business at least five years."

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality.

It's my opinion, as I say, enough was here shown to say there was effective counsel. There was - all the other things that were to be [191] addressed have been addressed. And those are my reasons for denying the petition.

Ms. COLE: Your Honor, we will notify the Court of our official intent to apply to the Supreme Court.

THE COURT: Thank you all.

(Discussion off the record.)

THE COURT: As the Court appreciates it, there's been an oral motion, rather an oral notice of appeal. The Court would like that to be filed by written notice, or motion, if you will, which, of course, is granted.

The Court feels that sixty days should be sufficient time. If it's not, certainly an extension would be entertained. And if that is the case, give sixty days for perfecting the appeal.

Ms. COLE: Sixty days from the physical filing of the notice, or sixty days from today?

THE COURT: Let's give -

MR. CREDO: The court reporter has sixty days from today to file the transcript.

(End of Proceedings.)

Supreme Court of Louisiana.
STATE ex rel. Robert SAWYER

v.

Ross MAGGIO, Jr. Warden, Louisiana
State Penitentiary.

No. 85-KP-2056.

Dec. 13, 1985.

In re Sawyer, Robert; applying for supervisory writs and writ of habeas corpus; Parish of Jefferson, 24th Judicial District Court, Div. "G", No. 79-2841.

Denied,

DIXON, C.J., and CALOGERO and DENNIS, J.J.,
would grant the writ.

ROBERT SAWYER	CIVIL ACTION
versus	NUMBER 86-223
FRANK BLACKBURN, WARDEN	SECTION "I" (4)

FINDING AND RECOMMENDATION

DATE OF ENTRY SEP 9 1986

On January 21, 1986, this matter was referred to the United States Magistrate for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Robert Sawyer is a state prisoner incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on September 19, 1980 of First Degree Murder after trial by jury in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana. The jury recommended that petitioner be sentenced to death.

Petitioner's conviction and sentence was affirmed on appeal. *State v. Sawyer*, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 335 (1983); See *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence. *Sawyer v. Louisiana*, 442 So.2d 1136 (La.

Petitioner was represented at the trial court level by James S. Weidner, Jr., Esquire, and by Samuel Stephens, Esquire. He was represented on his direct appeal by David Katner, Esquire, and by George Escher, Esquire.

In his application for habeas corpus relief under 28 U.S.C. § 2254, petitioner alleges a violation of the Constitution and laws of the United States as follows:

1. "The death-qualification of petitioner's guilt-phase jury was illegal and unconstitutional."
2. "Petitioner was denied the right of effective assistance of counsel in violation of his rights of equal protection and due process under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
3. "Petitioner received ineffective assistance of counsel from his court appointed attorney in violation of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
4. "Prosecutorial misconduct during closing argument in the penalty phase of the trial rendered petitioner's trial fundamentally unfair in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution and Article I, Section 2, 3 and 13 of the Louisiana Constitution of 1974."
5. "Petitioner was denied his right to a fair sentencing under the Eighth and Fourteenth Amendments of the United States."

Constitution and under the Louisiana Constitution, because the prosecutor injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence."

6. "Petitioner was denied his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and his right under Art. 1, Section 16 of the Louisiana Constitution of 1974 to decide for himself whether or not he would testify at trial."
7. "The trial court did not instruct the jury during the guilt/innocence phase of petitioner's trial that the defendant is not required to testify and that no presumption of guilt may be raised, thereby violating petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Louisiana."
8. "The trial court's instruction to the jury at the guilt/innocence phase of his trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."
9. "The trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial improperly beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential

element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."

10. "The trial court excused jurors, who expressed only general opposition to the death penalty, depriving petitioner of the right of a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the laws and Constitution of the State of Louisiana and the standards set in *Witherspoon v. Illinois*, 391 U.S. 510 (1968)."
11. "The imposition of a death sentence where one of the aggravating circumstances is not supported by the evidence violates the Eighth and Fourteenth Amendments."
12. "Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the introduction of inadmissible evidence that defense counsel had no effective opportunity to rebut during the capital sentencing hearing said evidence injected on arbitrary factor into the sentencing hearing."
13. "Petitioner's sentence is excessive and disproportionate."
14. "Petitioner's sentence is arbitrary and capricious."
15. "Electrocution is a cruel and unusual means of punishment."
16. "Petitioner's sentence is invidiously discriminatory."

17. "Capital punishment is an excessive penalty."
18. "The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights."

These grounds¹ were presented in an application for post-conviction relief to the state trial court. An evidentiary hearing was conducted by the trial court before denying petitioner's application.

Petitioner applied for writs of certiorari and review with the Louisiana Supreme Court of the trial court's denial of his application. The Louisiana Supreme Court denied petitioner's application without comment. *Sawyer v. Maggio*, 479 So.2d 360 (La. 1985). Application for reconsideration was denied. 480 So.2d 313 (La. 1985).

The duplicate record of the Louisiana Supreme Court is before this Court. This record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C. § 2254(b); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following statement of facts which are set forth in the opinion of the Supreme Court of Louisiana, recounting the events which led to petitioner being charged with murder.

"A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the

¹ Grounds 4, 11 and 12 additionally were presented to the Louisiana Supreme Court in petitioner's appeal of his conviction.

residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood

needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the

disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died." [Footnotes omitted]. *State v. Sawyer*, 422 So.2d 95, 97-98 (La. 1982).

1. The Death Qualification of Petitioner's Guilt-Phase Jury Was Illegal and Unconstitutional

Petitioner claims that he was denied his right to a fair trial under the Sixth, Eighth and Fourteenth Amendments because a qualified group of venire persons were excluded from both the penalty phase and the guilt phase of his trial on the grounds that they were opposed to the death penalty.

This issue is without merit, having been foreclosed by the Supreme Court's recent decision in *Lockhart v. McCree*, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); See *Brogdon v. Blackburn*, 790 F.2d 1164 (5th Cir. 1986).

2. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in grounds two and three of his application. Since the claims in both grounds are related, we will treat both claims together.

Petitioner first contends that he was denied the effective assistance of counsel by the failure of the state trial court to appoint an attorney with at least five years of experience to represent him.

Petitioner, an indigent, was entitled to court-appointed counsel. He was originally represented by Wiley Beevers who had been admitted to practice in Louisiana for over five years. Mr. Beevers, after reaching irreconcilable differences,² with petitioner was allowed to withdraw as counsel. The state trial court appointed James Weidner, Jr. to represent petitioner. Mr. Weidner advised the court that he had not been admitted to practice for five years but was told to associate counsel with the required number of years of experience.

Mr. Weidner, at the time of petitioner's trial, had been admitted to the practice of law approximately four years. Mr. Weidner attempted, but was unsuccessful in

² Mr. Beevers testified during the state's evidentiary hearing that the irreconcilable differences consisted of petitioner refusing to follow his advice to enter a plea of guilty to second degree murder or first degree murder without capital punishment. (R., Evidentiary Hearing, July 12, 1985, p. 16). Had petitioner accepted the offer of a plea agreement, he could only have received a sentence of life imprisonment. LSA R.S. 14:30.1.

securing an attorney to assist him at trial. (R., Tr., Evidentiary Hearing, July 12, 1985, p. 120). He was successful, however, in engaging Samuel B. Stephens to assist him with petitioner's case.³ At the time of trial, Mr. Stephens was just a few weeks shy of having been admitted to practice five years. (R., Petitioner's State Exhibit Z).

Louisiana law provides:

"When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel." Louisiana Code of Criminal Procedure (La. C.Cr.P. Art. 512).

Although it may be necessary to consider the performance by Messrs. Weidner and Stephens in connection with the above claim, the issue raised by petitioner is not an ineffective assistance of counsel claim, but essentially a denial of equal protection.

The state trial judge, after an evidentiary hearing, concluded that noncompliance with the directive of Article 512 is not fatal to a capital conviction when a defendant actually receives effective assistance of counsel.

³ Mr. Weidner also secured the services of John Tooley, an attorney with over twenty-eight years experience, to assist him in pre-trial hearings.

The trial judge for reasons orally assigned held:

"The man [Weidner] did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say 'You have to have been in business at least five years.'

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality." (R., Tr., Evidentiary Hearing, July 12, 1985, p. 190).

Prior to the Louisiana Supreme Court's remand with directions to conduct an evidentiary hearing, the state trial court issued written reasons substantially identical to those above in its initial (sic) denial of petitioner's application. (R., Reasons for Judgment, February 8, 1985, pp. 2-3).

At the conclusion of the evidentiary hearing conducted on July 12, 1985, the state trial judge denied petitioner's application for post-conviction relief on the above, as well as other grounds raised.

The Louisiana Supreme Court denied, without comment, petitioner's application for certiorari and review of the trial court's ruling.

The requirement that an attorney possess a minimum of five years experience before he can be appointed to represent a defendant charged with a capital crime is a requirement of state law.

While we are bound by determinations of state law by courts of that state, *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *Willeford v. Estelle*, 538 F.2d 1194 (5th Cir. 1976); *Hall v. Wainwright*, 493 F.2d 37 (5th Cir. 1974), we are unable to locate any other case in which the highest court of Louisiana has given the same interpretation to Article 512 as did the state trial court herein.⁴

The state trial court in its written reasons of February 8, 1985 concluded that petitioner's due process and equal protection rights were not violated by the failure of the court to appoint him an attorney with five or more years experience. (R., Reasons for Judgment, supra, p. 5). We do not have to reach the issue of whether petitioner's due process or equal protection rights were violated since any alleged breach of those rights was harmless beyond a

⁴ The refusal of the Louisiana Supreme Court to grant writs in the case *sub judice* does not constitute a ruling on the merits. See *State v. Guillot*, 353 So.2d 1005, 1007 n.1 (La. 1977); *Coco v. Winston Industries, Inc.*, 341 So.2d 32, 335 n.1 (La. 1977). The Louisiana Supreme court appeared to take the same approach taken by the state trial court herein in determining whether the dictates of Article 512 were violated in *State v. Motton*, 395 So.2d 1337, 1342 (La. 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981), when it held, on a record silent as to the length of time of practice of an appointed attorney, that the defendant failed to establish prejudice.

reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state trial court concluded in its assigned oral reasons that petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner] . . . we had a mature and reasoned and in some ways seasoned certainly beyond his physical, years, for the defense of this gentleman."⁵ (R., Evidentiary Hearing, July 12, 1985, p. 187).

A review of the state record convinces us that petitioner received the effective assistance of counsel in Mr. Weidner's representation.

The only prejudice that petitioner seeks to establish in not having been represented by counsel with at least five years experience is the alleged deficient conduct set forth in his claim of ineffective assistance of counsel. We find that claim to be meritless for reasons assigned below.

⁵ In the earlier stages of the criminal proceeding, petitioner was represented by Mr. Beevers, who met the time qualifications of Article 512. After Mr. Beevers withdrew as petitioner's attorney, Mr. Weidner along with Mr. John Tooley represented petitioner at hearings on pre-trial motions. At trial, Mr. Weidner had the assistance of Sam Stephens. Mr. Tooley had been a member of the bar for over twenty years. Mr. Stephens had been a member for four years, eleven months and a few weeks. Although Messrs. Tooley and Stephens were not appointed by the court to represent petitioner, a distinction perhaps with little difference, it would appear that petitioner was at all times represented by counsel within the spirit, if not the letter of Article 512.

The state court record and the trial transcript reveal that the evidence of petitioner's guilt was ample. Petitioner's exculpatory statement introduced into evidence at trial by the state alleged that Lane was responsible for the acts causing the victim's death. However, defendant did not seriously contest at trial his involvement in the beating and burning of the victim. The theory of his defense was that he lacked the specific intent to commit first degree murder due to intoxication. Ms. Shano testified that she saw petitioner kick Ms. Arwood into the bathtub rendering her unconscious. (R., Tr., pp. 1146-49). She also saw petitioner pour hot water on Ms. Arwood, walk all over her back as she was lying on the floor and beat her with a belt. (R., Tr., pp. 1149-50). Ms. Shano also testified that she overheard petitioner say, "[I] can show you how cruel I can be . . ." just before she smelled something burning. (R., Tr., p. 1151). Ms. Shano also overheard conversations between Lane and petitioner which indicated petitioner set fire to Ms. Arwood. (R., Tr., p. 1152).

The fingerprints found on the can of lighter fluid used to set Ms. Arwood on fire belonged to petitioner. The Louisiana Supreme Court found the evidence "ample" from which a rational juror could have found that the defendant was engaged in the perpetration of aggravated arson and that he had acted with specific intent. *State v. Sawyer*, supra, 422 So.2d at 99. The court's determination is entitled to great weight. *Wingo v. Blackburn*, 786 F.2d 654 (5th Cir. 1986). Webster's New Collegiate Dictionary defines ample as "generous or more than adequate in size, scope, or capacity . . . generously sufficient to satisfy a requirement or need".

Petitioner does not address the deficiency of appellate counsel, both of whom he claims had not been admitted to practice for more than five years at the time of their representation of him.

The record reflects that these attorneys presented both meaningful and serious issues to the Louisiana Supreme Court in petitioner's appeal.

Petitioner does not suggest other issues appellate counsel might have urged on appeal. Petitioner must establish "... [t]hat counsel's errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment." *McCrae v. Blackburn*, 793 F.2d 684 (5th Cir. 1986). Any error in the appointment of appellate counsel with more than five years experience to represent petitioner is likewise harmless beyond a reasonable doubt.

Petitioner's claim that he was denied equal protection of the law in the appointment of counsel with less than five years experience is without merit.

Petitioner raises several instances of alleged deficient conduct on the part of his counsel in his claim that he did not receive the effective assistance of counsel.

He claims that counsel: -

- a) was admitted to practice for less than five years;
- b) objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;
- c) failed to object during voir dire to the prosecutor's reference to evidentiary facts that were not later established at trial;

- d) failed to conduct a meaningful voir dire;
- e) failed to discuss with petitioner the nature of the defense;
- f) failed to allow petitioner to testify during the guilt phase of the trial;
- g) failed to adequately prepare defense witnesses for trial;
- h) failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;
- i) failed to present a closing argument during the guilt phase of the trial;
- j) presented an unprepared defense during the penalty phase of trial;
- k) failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;
- l) failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and
- m) failed to make effective closing argument during penalty phase of trial.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show: 1) that his counsel's performance was deficient; and, 2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984).

Under the Supreme Court's formulation of the required showing of prejudice,

"[T]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding

° would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, supra, 104 S.Ct. at 2068.

If the Court finds that petitioner has made an insufficient showing as to either one of the two stages of inquiry, i.e. deficient performance or actual prejudice, the Court may dispose of the claim without addressing the other stage. *Strickland v. Washington*, supra, 104 S.Ct. at 2069-70.

In determining whether counsel's performance falls below the objective standard of reasonableness, our scrutiny should be "highly deferential", recognizing "... strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". *Strickland v. Washington*, supra, 104 S.Ct. at 2066; *Marler v. Blackburn*, 777 F.2d 1007 (5th Cir. 1985).

Petitioner may not simply allege prejudice, he must affirmatively prove it. *Strickland v. Washington*, supra, 104 S.Ct. at 2067; *Celestine v. Blackburn*, 750 F.2d 353 (5th Cir. 1984), cert denied, ___ U.S. ___, 105 S.Ct. 3490, ___ L.Ed.2d ___ (1985); *Hayes v. Maggio*, 699 F.2d 198 (5th Cir. 1983).

We now treat petitioner's individual claims of ineffective assistance of counsel.

a) Counsel's Admission To Practice For Less Than Five Years

Mere inexperience alone will not determine whether a defendant received effective assistance of counsel. The test rather is counsel's performance in representing the

defendant. *United States ex. rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109; *United States v. Badolato*, 701 F.2d 915 (11th Cir. 1983).

Petitioner has not established that trial and appellate counsel's failure to meet the five year admission to practice minimum resulted in any prejudice to him. Counsel were effective. Petitioner does not show that the results of the trial or appeal would have been any different had counsel with more experience been appointed.

b) Counsel Objected To The Prosecutor Advising The Jury Panel During Voir Dire Of The Penalties For A Lesser Included Offense

Petitioner suggests that the jury should have been made aware that he could have been sentenced: 1) to life imprisonment, without benefit of parole, probation or suspension of sentence if it returned a guilty verdict of second degree murder; or, 2) twenty years imprisonment on a verdict of manslaughter. Petitioner does not explain, however, how this prejudiced him since it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder. Petitioner's contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence.

We are convinced, in view of the evidence, that the verdict would not have been different had the jury been made aware of the alternate penalties.

c) Counsel Failed To Object During Voir Dire To The Prosecutor's Reference To Facts Not Later Established At Trial

Petitioner singles out two references made by the prosecutor during voir dire examination to support his claim. The references are to claims by the prosecutor that "... [S]he [the victim] had a hammer shoved up her vaginal area as well as other incidents"; and "she was halfway drowned in the bathtub and set on fire after she was raped". (R., Petition, pp. 12-13).

The second referenced statement above was not a mischaracterization of the evidence ultimately produced during the trial. There is support in the evidence offered at trial that the victim was "halfway" drowned in the bathtub and set on fire after she was raped.

There was no evidence introduced during trial, however, which would support the first referenced statement that a hammer was used in the attack upon the victim.

Had counsel objected to the remark during voir dire, the jury's verdict would not have been different. The reference by the prosecutor to the use of the hammer, viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict.

Defense counsel did request a mistrial during the testimony of a state witness who alluded to the possible use of a hammer during the attack on the victim. The court denied the motion and instructed the jury that up to that point in the trial, there had been no testimony about a hammer and to disregard the witness's comment. (R. Tr., pp. 1282-1285).

Petitioner suffered no prejudice by the prosecutor's earlier remark.

d) Counsel Failed To Conduct A Meaningful Voir Dire

Petitioner complains that counsel failed to inquire during voir dire examination of the prospective jurors' prior jury service and their attitude regarding the failure of a defendant to testify in his own behalf.

Petitioner does not articulate how he was prejudiced by counsel's failure to find out if the juror had prior jury service. It would be pure speculation to consider that one or more of the selected jurors would have been excused if it was known that he or she had served on a prior jury.

Additionally, petitioner has not established if there was in fact any jurors who had prior jury service.

Likewise, counsel's failure to inquire of the jurors' attitude regarding a defendant's failure to take the stand does not entitle petitioner to relief herein.

Counsel did not plan to call petitioner to the stand during the guilt phase of the trial. He testified during the state evidentiary hearing that he did not ask the prospective jurors about their attitude toward a defendant not taking the stand on his behalf, to avoid emphasizing the fact that petitioner would not in fact testify. It was a tactical decision. (R., Evidentiary Hearing, July 12, 1985, pp. 146-47).

e) Counsel Failed To Discuss The Nature Of His Defense With Petitioner

Petitioner claims that counsel did not consult with him about his defense and refers to an affidavit filed in the state record as Exhibit "AA" in support of his claim.

The allegations in petitioner's affidavit belie any contention that he was not apprised of the defense that was going to be presented on his behalf. He admitted discussing the case with counsel on several occasions, and on one occasion was told that "alcohol psychosis" would be advanced as a defense to the crime.

Petitioner's claim that he was not advised of his defense before trial is contradicted by his own affidavit, as well as Mr. Weidner's testimony during the state evidentiary hearing.

f) Counsel Failed To Advise Petitioner Of His Right To Testify On His Own Behalf

Petitioner, in connection with this claim, complains that he was not given the opportunity by his attorney on his own decision as to whether he would testify on his own behalf. Petitioner claims that he would have testified given the choice.

Petitioner, however, does not indicate what his testimony would have consisted of, had he been allowed to testify. He testified during the penalty phase of the trial that he remembered little about the events of the night. (R., Tr., p. 1508).

The fact of petitioner's prior conviction for involuntary manslaughter could have been revealed during the

guilt phase of the trial had petitioner taken the stand, a factor that could not but further damage any defense petitioner presented. In fact, petitioner's prior conviction, and its possible revelation during the guilt phase of the trial was a major reason his counsel decided not to put him on the witness stand. (R., Evidentiary Hearing, July 12, 1985, p. 126).

Petitioner's exculpatory statement, given the police shortly after his arrest, in which he put the blame for the victim's injuries on his co-defendant was read to the jury during the state's case in chief.

Had petitioner testified at trial, he may have had difficulty in reconciling for the jury his defense of lack of intent to commit the crime due to intoxication, and his prior statement that someone else committed the crime.

We cannot second-guess counsel's strategy in not calling petitioner to the stand. The decision not to do so was not outside the realm of effective representation.

Mr. Weidner testified during the state evidentiary hearing that he consulted with petitioner on several occasions concerning not calling him as a witness. (R., Evidentiary Hearing, July 12, 1985, p. 124-25). It was not brought out, however, if counsel, as claimed by petitioner, gave him an opportunity to make the decision himself as to whether he wanted to testify. Petitioner does not claim he made a request of his counsel to testify, he merely asserts he was not given an opportunity to make that choice.

Even assuming that petitioner in fact was not given the opportunity by counsel to make that decision, he has

failed to establish that he was prejudiced by the alleged error. Petitioner does not indicate what his testimony would have been had he testified during trial.

g) Counsel Failed To Adequately Prepare Defense Witnesses For Trial

Petitioner complains that his attorney called only five witnesses in his defense and spent only one-half hour with two of those witnesses, his sister and brother-in-law, in preparing their testimony for trial.

Brevity of time spent by counsel in preparing a case is not of itself sufficient to provide relief to a habeas applicant. *Schwander v. Blackburn*, 750 F.2d 494 (5th Cir. 1985)

Petitioner does not indicate what additional facts would have been established at trial had counsel spent more time with the two witnesses mentioned above. It is unclear by petitioner's statement that "a total of only five defense witnesses were called to testify," whether he is complaining that other witnesses should have been called. One of petitioner's present counsel filed an affidavit in the state court proceedings that petitioner's sister gave her the names of several witnesses who would have been available to testify at petitioner's trial. (R., Application for Writs to Louisiana Supreme Court, NO. 84 KP 0919, Exhibit S). This list of potential witnesses all appear to be relatives of petitioner. There are no allegations, however, as to what their expected testimony would be.

Without specific allegations of the expected testimony of other witnesses and some indication that they

would have been available to testify at trial, petitioner has failed to establish prejudice.

h) Counsel Failed to Call An Expert To Give An Opinion As To The Effect Of Alcohol On Petitioner

Petitioner, while acknowledging that his attorney obtained the testimony of two physicians in aid of his defense of toxic psychosis, complains that his attorney should have procured other experts, who, presumably after examining petitioner, would be able to testify as to the effect alcohol has on petitioner.

The two experts who testified on petitioner's behalf were Doctors Albert DeVilliere and Genevieve Arneson, psychiatrists, who had been appointed to a pre-trial lunacy commission to examine petitioner. Each examined petitioner approximately for one-half hour in connection with that earlier proceeding and concluded that petitioner understood the nature of the charges filed against him and was able to assist his attorney in his defense.

Counsel for petitioner was successful at trial in eliciting opinions from these two experts which supported the defense of toxic psychosis. (R., Tr., pp. 1337, 1338, 1409).

Petitioner complains, however, that these opinions were based upon a set of hypothetical facts only, and that counsel should have procured an expert who could have testified as to the actual effect of alcohol on him.

Petitioner does not suggest what type of examination would produce the type of results he seeks or that those results would even be obtainable.

Dr. DeVilliere testified both at trial and during the sanity commission proceeding that there are no tests to determine a man's intent or the effect of toxic psychosis on that intent at the time of the crime. He claimed that a physician would have to be at the scene of the crime during its commission to be in a position to render such an opinion. (R., Tr., pp. 436, 1314).

Petitioner offers no evidence that establishes he actually suffered from toxic psychosis to justify our considering his claim.

i) Counsel Failed to Present A Closing Argument During The Guilt Phase of Trial

Petitioner complains that his attorney was deficient in not presenting a closing argument during the guilt phase of trial.

Mr. Weidner testified during the state evidentiary hearing that he made a deliberate decision not to give a closing argument based upon two separate considerations. First of all, he was knowledgeable of the prosecutor's reputation for presenting strong and damaging rebuttal arguments. Since the prosecutor had given what Weidner considered to be a "mild" closing argument, he hoped to prevent, by not giving a closing argument, the prosecutor presenting a stronger rebuttal. (R., Evidentiary Hearing, July 15, 1985, p. 128).

Secondly, Weidner realized the strong case the state had against his client as to his guilt and felt the chance of salvaging anything for his client was in the penalty phase

where he hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk what credibility he may have had with the jury by advancing arguments as to petitioner's innocence that the jury might perceive to have been totally unsupportable.

While an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do find that to be the result in the case before us.

Mr. Weidner believed the case against his client on the guilt phase to be very strong. Prior counsel, Beevers, had withdrawn from the case after he and Sam Dalton, a Jefferson attorney experienced in the defense of capital cases, failed to convince petitioner to accept a plea bargaining agreement to plead to the lesser charge of second degree murder. They likewise had believed the case against petitioner to be very strong. (R. Evidentiary Hearing, July 195, 185, p. 14-15.).

Under the circumstances, the jury could not help but to have understood the nature of petitioner's defense. They were apprised of it during voir dire and counsel's opening statement. The testimony of defense witnesses as to aspects of the theory of defense was simple and direct. Counsel's participation in the entire trial was quite active. See *Martin v. McCotter*, No. 85-1311, slip. op. 8385-86 (5th Cir. August 13, 1986).

We are convinced that had counsel presented a closing argument, the jury's verdict would not have been different.

j) Counsel Presented An Unprepared Defense During The Penalty Phase Of The Trial

Petitioner complains that counsel did not conduct a proper investigation in connection with the penalty phase of his trial which resulted in the failure to call other witnesses or present mitigating evidence.

With the possible exception of the names of relatives contained in his attorney's affidavit mentioned above, petitioner does not identify these additional witnesses or the substance of their testimony. He does not indicate what additional evidence his sister would have offered.

Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization.

The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses in the penalty phase of the trial.

Petitioner has not established prejudice in connection with the above issue.

k) Counsel Failed To Object Or Move For A Mistrial During Improper Argument By The Prosecutor During The Penalty Phase Of Trial

Petitioner, in support of the above claim, refers to statements made by the prosecutor which are set out in claims of alleged error in his application for relief, i.e., claims 4 and 5 below.

We find no prejudice to petitioner based upon the above alleged error for reasons that will be obvious when we treat this issue more fully in connection with petitioner's claims 4 and 5 below.

1) Counsel Failed To Object To Erroneous Instructions Given Jury By Court During Guilt And Penalty Phase Of Trial

Petitioner claims that counsel should have objected to the trial court's a) failure to instruct the jury as to how they should treat a defendant's failure to testify; b) instruction on intent; and, c) instruction defining principles.

We will treat below petitioner's complaints as to b and c above, in connection with related issues raised in claims 8 and 9.

As to counsel's failure to object to the court's charge to the jury in that it did not include a charge as to how the jury should treat a defendant's failure to testify on his behalf, Mr. Weidner testified during the state hearing that he purposely requested the court to omit that charge to avoid calling undue attention to the fact that petitioner did not take the stand. (R., Evidentiary Hearing, July 12, 1985, pp. 150-51). Mr. Weidner's decision falls within the definition of trial strategy.

If the particular charge had been included in the court's instructions, the result of the trial would not have been different.

m) Counsel Failed To Make An Effective Closing Argument During The Penalty Phase Of The Trial

Counsel's argument during the penalty phase of the trial is contained in approximately one typewritten page of the trial transcript.

Petitioner complains that the argument was cursory, perfunctory and unpersuasive. We conclude that it was unpersuasive because it was unsuccessful, but lack of success of itself would not result in a conclusion that counsel was ineffective.

The remarks of counsel were of a cursory and perfunctory nature, but petitioner has not established that the jury's recommendation would have been different had counsel dealt longer on mitigating factors favoring him. There was little available by way of mitigation in petitioner's favor.

4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner complains that the prosecutor was guilty of misconduct when he made references to the possibility of a pardon for petitioner if the jury recommended life imprisonment. Additionally, he claims that the assistant district attorney's appeal to a "war on crime", or "community expectation" argument to the jury prejudiced

him. The portions of the rebuttal argument to which petitioner objects follows:⁶

"At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statue (sic) does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. Tr.Tr. 986:14-29.

... if the law which we have in this state is to have any piece [sic], if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the lines because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for

⁶ Petitioner also refers us in his petition to the prosecutor's entire closing argument and rebuttal, both in the guilt and penalty phase of the trial in support of his claim of prosecutorial misconduct without pointing out specific portions of the argument as constituting error. Mere conclusory allegations of error are insufficient to support a claim for relief. See *Ross v. Estelle*, 694 F.2d 1008 (5th Cir. 1983).

killing a four year old child, then what are the people of this Parish to believe. They are going to believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. . . . Tr.Tr. 987-17-29; 988:1-6." (R., Petition, p. 170).

The Louisiana Supreme Court discussed in its opinion affirming petitioner's conviction, the prosecutor's reference to the possibility of a pardon, and found petitioner's claim to be without merit.

That Court held:

" . . . There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. *State v. Willie*, 410 So. 2d 1019 (La. 1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See *State v. Lindsey*, 404 So.2d 466 (La. 1981), and *State v. Willie*, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the 'living death of life imprisonment',

which implied that defendant could never be released. Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of the inappropriate considerations." [Footnotes omitted]. *State v. Sawyer*, supra, 422 So.2d at 104.

We do not disagree with the Supreme Court's conclusion on this issue. Nor do we find merit to petitioner's claim that the prosecutor's use of a "war on crime" argument or his appeal to the jury that the community might not understand a verdict which did not impose the death penalty prejudiced him. See *Whittington v. Estelle*, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 464 U.S. 983, 104 S.Ct. 428, ___ L.Ed.2d ___ (1983).

A prosecutor is permitted in closing argument to state to the jury what he believes to have been established and to comment fairly on it. *Whittington v. Estelle*, supra.

Prejudicial comments by a prosecutor in closing argument will justify federal habeas relief only if the error was material in the sense of a crucial, critical and highly significant factor. *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); *Lowery v Estelle*, 696 F.2d 333 (5th Cir. 1983).

A prosecutor's improper argument to the jury

"... [d]oes not present a claim of constitutional magnitude which is cognizable in a proceeding under 28 U.S.C. 2254 unless such argument is so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." *Whittington v. Estelle*, supra, at 1421.

In viewing the remarks of the prosecutor in the context of the entire trial, which we must, we conclude that the remarks were not so prejudicial as to render the trial fundamentally unfair.

Since petitioner was not prejudiced by the remarks, petitioner is not entitled to relief on his claim of ineffective assistance of counsel presented in claim 3, k above.

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner additionally complains of the following closing remarks by the prosecution as being prejudicial:

"... you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you

that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. Tr.Tr. 982: 6-21.

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. Tr.Tr. 984:10-21." (R., Petition, p. 18).

The issue raised by the above quoted argument of the prosecutor is a vague reference to the possible review of the jury's verdict by a higher court.

An argument by a prosecutor, in the penalty phase of a capital case, which suggests to the jury that its responsibility is lessened by appellate review has been condemned in *Caldwell v. Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The State prosecutor in the case *sub judice* made another reference to possible review of the jury's verdict by a higher court of which petitioner does not complain.

"It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me

there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have crossed examined him and gone more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal Mr. Weidner argues. Thank you." (R., Tr., p. 1519).

Because petitioner did not complain of the comments immediately above, either in his habeas application filed herein or his state habeas proceedings, we cannot consider whether those comments present any grounds for relief.

Although petitioner has not urged error in the prosecutor's comments quoted immediately above, we should, however, consider the possible effect of those comments on the outcome of the proceedings since we are required to view the comments of which petitioner complains in light of the entire record.

Petitioner's counsel did not object to the prosecutor's comments at the time they were made. The contemporaneous objection rule would not prevent our consideration of the claimed error, as the Louisiana courts themselves

in a death case would not be constrained from considering the merits of the issue. *State v. Willie*, supra.⁷

While the prosecutor's comments in the instant case dangerously approach reversible error, we do not believe it actually reaches that mark.

The remarks herein are distinguishable from the prosecutor's remarks condemned in *Caldwell*. In *Caldwell*, the assistant district attorney made the following argument in response to the defendant advising the jury of their awesome responsibility in imposing the death penalty:

'ASSISTANT DISTRICT ATTORNEY:

Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its (sic) fair. I think its (sic) unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know - they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

⁷ In fact, in the case *sub judice*, the Louisiana Supreme Court sua sponte noticed a potential problem with the prosecutor's reference to a possible pardon despite the absence of a contemporaneous objection. *Sawyer*, supra, 422 So.2d at 104. It is perhaps significant that the Louisiana Supreme Court, in fulfilling their duty in death cases to view the record for any apparent error in the record, did not consider apparently that the remarks petitioner complains of above were significantly prejudicial.

'COUNSEL FOR DEFENDANT:

Your Honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY:

Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

'THE COURT:

Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY:

Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shall not kill." If that applies to him it applies to you, insinuating that your decision is the final decision and that they're gonna to take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think its (sic) unfair and I don't mind telling them so.' *Caldwell v. Mississippi*, supra, at 2637-38.

A consideration by the *Caldwell* court was that the prosecutor's remarks in that case were "focused, unambiguous and strong" and because the trial judge, not only failed to give a curative instruction, but openly approved the prosecutor's remarks. *Caldwell v. Mississippi*, supra, at 2645.

The comments complained of herein were ambiguous and not merely as strong as the comments in *Caldwell*. The Court's instructions to the jury in the case herein did not lend support to the prosecutor's statements concerning appellate review. To the contrary, the trial court, after meticulously instructing the jurors on the factors they were to consider in their deliberations, concluded with the injunction, that "[I]t is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or to life imprisonment." [Emphasis added]. (R., Tr., p. 1527).

The prosecutor's remarks complained of herein, while suggesting possible appellate review, were not sufficient to form a conclusion that the jury's responsibility was lessened by appellate review. The prosecutor told the jury in effect that you [the jury] by recommending the death penalty will be telling any court that reviews this case that " . . . [t]his man from his actions could be prosecuted to the fullest extent of the law". (R. Tr., p. 1518).

Reference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty.

As observed in *State v. Mattheson*, 407 So.2d 1150, 1165 (La. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); quoting *State v. Berry*, 391 So.2d 406 (La. 1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981) " . . . virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and

the court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility". See also *Moore v. Maggio*, 740 F.2d 308, 320 (5th Cir. 1984); on subsequent application for habeas relief, 774 F.2d 97, 98 (5th Cir. 1985).

Although *Mattheson* was decided prior to *Caldwell*, its rationale appears to comport with the holding in *Caldwell*.

Even considering the prosecutor's remarks in connection with the comments appearing on page 1519 of the trial transcript, petitioner was not prejudiced. Those later comments, although "hinting" that an appellate court might have the final decision on the imposition of the death penalty, the comments are ambiguous at best.

The prosecutor told the jury:

" . . . [a]nd if you are wrong in your decision, believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions." (R., Tr., p. 1519). [Emphasis added].

The above quote, when viewed as a whole, would not necessarily suggest to the jury that its responsibility is lessened, considering the prosecutor's statement to the jury to " . . . have the courage of your convictions".

The standard to be employed in determining whether prejudice resulted from alleged improper remarks by the prosecutor, condemned in *Caldwell*, is the "reasonable probability" test for determining prejudice established by *Strickland v. Washington*, supra. See *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) en banc; *Bowen v. Kemp*, 769

F.2d 672 (11th Cir. 1985), rehearing denied, 776 F.2d 1486 (commenting that there is no incompatibility between the standard enunciated in *Caldwell* and that established in *Strickland*). rehearing en banc denied, 778 F.2d 623 (11th Cir. 1985).

The defendant must show under the appropriate standard, " . . . that there is a reasonable probability that, but for counsel's [prosecutor's] unprofessional errors, the result of the proceeding would have been different: a reasonable probability is a probability sufficient to undermine confidence in the outcome". *Strickland v. Washington*, supra. 104 S.Ct. at 2068.

In the instant case, the jury found two aggravating circumstances to support its recommendation of the imposition of the death penalty, when only a finding of one would have been sufficient. The evidence of defendant's guilt was ample. There was little in the way of mitigating evidence. The court's instructions properly directed the jury's attention to those factors it was to consider in arriving at a recommendation.

The Louisiana Supreme Court, upon review of the record on appeal, determined:

"We are convinced . . . that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning the recommendation on appeal." *State v. Sawyer*, supra, 422 So.2d at 106.

The court's finding is entitled to great weight. *Wingo v. Blackburn*, supra.

We conclude, based on the above considerations, that there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different.

For these same reasons, we conclude that petitioner has failed to establish prejudice on the claim of ineffective assistance of counsel raised in ground 3, k above.

6. FAILURE TO ALLOW PETITIONER THE RIGHT TO MAKE DECISION AS TO WHETHER HE WOULD TESTIFY ON HIS OWN BEHALF

Petitioner complains that his attorney made the decision on his own as to whether or not petitioner would testify during the guilt phase of the trial without advising him that he had a right to make that decision himself.

A related issue involving a claim of ineffective assistance of counsel has been disposed of above.

Petitioner does not claim that he ever made a request of his counsel to be allowed to testify. Petitioner does not indicate what his testimony would have been had he made the decision to testify. Petitioner has not established that he was prejudiced by the alleged error.

7. TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO HOW THEY SHOULD TREAT A DEFENDANT'S FAILURE TO TESTIFY

Petitioner claims that he was prejudiced by the trial court's failure to include an instruction to the jury that a

defendant is not required to testify and that no presumption of guilt may be drawn from the fact that a defendant does not testify.

The record reflects that the state judge's instructions to the jury did not contain such a charge.

Mr. Weidner testified at the evidentiary hearing that he requested the trial judge not to include the above charge in the court's instructions as a strategy moved to avoid undue attention being drawn to the fact that defendant did not take the stand in his defense.

No error was committed by the court for failing to include the charge since it was purposefully omitted at the request of defense counsel.

We have already disposed of petitioner's allegations that counsel's request to the court to omit the charge constituted ineffective assistance of counsel.

8. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following instruction given the jury by the trial court had the effect of relieving the state from its burden of proving "specific intent" an element of the crime.

"A specific intent to kill may be implied where there are no external signs of the intent beyond the mere facts of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing. Tr.T. 926:19-24." [R. Tr., p. 1481].

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. LSA Louisiana Code of Criminal Procedure Art. 841. Absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim would not be reviewable in the state court because of the default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Petitioner does not allege cause for the failure to object to the charge. A claim that the "cause" was due to counsel's ineffectiveness is not sufficient to establish cause. *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). See *Weaver v. McKaskle*, 733 F.2d 1103 (5th Cir. 1984); *Stokes v. Procunier*, 744 F.2d 475 (5th Cir. 1984).

Even if cause existed for failure to object to the charge, petitioner would not be entitled to relief on the above claim. The complained of charge quoted above is only a small part of the entire instruction given the jury on "specific intent". The quote is taken out of context. A review of the court's entire charge on that element of the offense reveals that the jury was instructed how they *may* treat various factual circumstances [including the one petitioner complained of] in order to determine whether a defendant had specific intent to kill someone. [Emphasis added]. The court concluded by telling the jury: "Therefore you should determine whether or not there was criminal intent by considering all of the facts and circumstances of this case". (R., Tr., p. 1482).

Because we would determine the charge complained of to have been proper, petitioner's companion claim that counsel's failure to object to the charge constituted ineffective assistance of counsel is without merit.

9. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following charge on the law of principles improperly relieved the state of its burden to prove specific intent.

"All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principle.

In order words, to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense.

All persons knowing the unlawful intent of the person committing the crime, who are present, consenting thereto, and aiding and abetting either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment. (T.T. 931:5-24)." [R., Tr., p. 1466].

No contemporaneous objection was made in connection with the above charge to the jury and there is no

objection of cause for the failure to object to the charge. This claim as well as petitioner's companion claim of counsel's failure to object to the above charge is without merit.⁸

10. TRIAL COURT ERRED IN EXCUSING A JUROR WHO EXPRESSED ONLY A GENERAL OPPOSITION TO THE DEATH PENALTY

Petitioner complains that the court excused a prospective juror after she expressed only a general opposition to the imposition of the death penalty.

⁸ Petitioner would not succeed on the merits of this claim. Petitioner argues in his brief that the above instruction might have caused the jury to have found him guilty if they believed that he failed to prevent Land from beating the victim. Petitioner fails to include the trial court's complete charge on principles which include an instruction that a person cannot be considered a principal under the circumstances suggested by petitioner. (R., Tr., p. 1467). *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982), reh'g denied, 697 F.2d 699 (1983) cited by petitioner in support of his claim involved a conspiracy instruction and its holding is inapposit (sic) to the conclusion we reach herein. In the instruction given herein, the court charged the jury that a principal is one who " . . . [k]nowing the unlawful intent of the person committing the crime . . . , [and] . . . consenting thereto. . . " aids and abets in the commission of the crime. (R., Tr., p. 1466). The prosecutor referred to the law or principals in his closing argument. (R., Tr., p. 1444). However, it was in reference to petitioner being a principal in the aggravated rape of Ms. Arwood. The argument was harmless, since the jury did not find the aggravated rape to have been an aggravating circumstance after the penalty hearing. The evidence at trial established that petitioner did not participate in the crime merely as an aider and abetter. He himself beat the victim, caused her to become unconscious when he kicked her into the bathtub, poured the lighter fluid on her and lit her on fire.

The juror, Gwendolyn Lee, when asked her feelings toward the death penalty, replied:

"What are your feelings about capital punishment?"

A. I don't agree with it.

Q. You say you don't agree with it. That is regardless of what the evidence may show, no matter how heinous of a crime, you are telling me you are morally or religiously, no matter what the evidence may show you could not even consider the imposition of the death penalty?

A. No I don't think it is fair.

Q. You don't think it's fair. You have had this belief for quite some time?

A. Yes.

Q. Is this a religious belief, is the death penalty contrary to your religion?

A. Yes.

Q. You have strong contrary objections to it no matter what the evidence may show.

A. That is right.

* * *

THE COURT:

Let me explain this to you, Mrs. Lee. We do have a death penalty in Louisiana. That doesn't mean it would be imposed in this case or any other case. What Mr. Weidner is asking you if the facts of this case indicate that the death penalty should be imposed, could you vote for it under those circumstances?

MRS. LEE:

I really don't think I could.

THE COURT:

You don't think you could?

MRS. LEE:

No." (R., Tr, pp. 811-813).

The inquiry that we must make to determine if a juror may be excluded for his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright v. Witt*, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Wicker v. McCotter*, 783 F.2d 487 (5th Cir. 1986).

This test is to be applied primarily by the trial judge and his determination that a juror should be excused because of his or her views on capital punishment is accorded a presumption of correctness under 28 U.S.C. § 2254(d). *Wicker v. McCotter*, *supra*, at 493.

There is support for the trial court's determination that Mrs. Lee's views on capital punishment might substantially impair her performance as a juror.

11. VIOLATION OF PETITIONER'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENT WHEN ONE OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY EVIDENCE

The issue petitioner raises under this claim is essentially a complaint that he was prejudiced in the penalty phase of his trial by the introduction of a crime, the

involuntary manslaughter of a child, which was unrelated to any aggravating circumstances upon which the jury could find in imposing the death penalty.⁹

Although petitioner does not articulate the constitutional error present in this claim, it would appear that he is complaining of the same error that was raised in his direct appeal and on which the United States Supreme Court remanded to the Louisiana Supreme Court for further consideration in light of the former Court's holding in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

The court in *Zant* held *inter alia* that a death sentence based upon two or more statutory qualifying grounds, one of which was later determined to be invalid, would not automatically require reversal of the death penalty unless it was determined that the deficient ground was invalidated on the basis it involved constitutionally protected activity, or the penalty was arbitrary and capricious because the invalidated ground involved in introduction of evidence not otherwise admissible.

⁹ It is unclear from the petition filed by petitioner whether he is also complaining that evidentiary support for all of the aggravating circumstances found by the jury was required. This issue, if raised, is without merit. This issue was treated fully in petitioner's direct appeal. The Louisiana Supreme Court held that an "... [a]dequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenses properly exposed to the possibility of the death sentence. See *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982) (en banc)." *State v. Sawyer*, 422 So.2d at 101-102.

On remand, the Louisiana Supreme Court held that the holding in *Zant* did not preclude the affirmance of the imposition of the death penalty in petitioner's case since the evidence of the manslaughter conviction, even if erroneously admitted to support one of the aggravating circumstances, was properly admitted to shed light on petitioner's character. *Sawyer v. Louisiana*, 442 So.2d 1136 at 1139-40.

A defendant's character constitutes (sic) valid considerations by the jury during the penalty phase of the trial. LSA Louisiana Code of Criminal Procedure Art. 905.2.

Petitioner's application for writ of certiorari to the United States Supreme Court from the decision of the state court after remand was denied. *Sawyer v. Louisiana*, ___ U.S. ___, 104 S.Ct. 1719, ___ L.Ed.2d ___ (1983).

Petitioner does not raise a constitutional question under the present claim as the evidence of manslaughter conviction was properly admissible under Louisiana law to establish petitioner's character, an important and relevant issue during the penalty phase of the trial.

12. INADMISSIBLE EVIDENCE WAS INTRODUCED DURING PENALTY PHASE OF TRIAL

Petitioner next complains about the prosecutor's reference during the penalty phase of the trial to the hearsay statements of uncalled witnesses, that the child, who was the victim of the Arkansas manslaughter conviction, was the victim of prior physical abuse at the hands of petitioner.

Petitioner refers in his petition to the following statements of the prosecutor as objectionable:

"If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that (sic) constantly beaten by your brother, would you believe those six people? (See T.T. p. 961)." (R., Tr., p. 1496).

"I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such. . . ." See T.T. 961-962. (R., Tr., p. 1496-97).

Petitioner goes on to complain that subsequent to the second statement quoted above, the prosecutor elicited testimony from the state's witness about information that the child was the victim of prior abuse, which information was contained in the hospital report prepared on the date the child was admitted with her fatal injury.

The prosecutor apparently used this material in an attempt to counteract the favorable testimony of petitioner's sister that he took good care of the child.

Petitioner admitted in his testimony during the penalty phase of the trial that the child did have bruises on her body the day she was brought to the hospital. He denied that the prior injuries were caused by him, but laid the blame on the child's mother.

Petitioner did not object at trial to the testimony of which he now complains herein. The contemporaneous objection rule is not an issue in considering this claim, however, since the state has not raised the rule in connection with this claim in its response to the petition. See *Miller v. Estelle*, 677 F.2d 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

Hearsay testimony, with certain limited exceptions, is generally inadmissible. We can only conclude, without any suggestion to the contrary by the respondent, that the statements and testimony complained of herein were inadmissible.

The admission of the testimony complained of above must have resulted in a denial of fundamental fairness to entitle him to habeas corpus relief in this Court. *Scott v. Maggio*, 695 F.2d 916 (5th Cir. 1983).

" . . . [t]he mere erroneous admission of prejudicial testimony does not in itself, justify federal habeas relief unless it is 'material in the sense of a crucial, critical, highly significant factor,' in the context of the entire trial." *Menzies v. Pro-cunier*, 743 F.2d 281, 288 (5th Cir. 1984) quoting *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983).

Petitioner admitted that he had spanked the child with a belt on several occasions prior to her death. Any reference by the prosecutor, in light of that admission, that he had statements from six people that petitioner constantly beat the child was harmless.

Petitioner has failed to demonstrate fundamental fairness.

Petitioner additionally complains about the use, during his cross-examination, of a prior statement he gave in connection with the Arkansas case. He claims that the prosecutor introduced the statement without first establishing at trial that the statement was voluntary.

Petitioner failed to establish prejudice. The burden of proof in an habeas application is upon the habeas petitioner. *Walker v. Maggio*, 738 F.2d 714 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 793, ___ L.Ed.2d ___ (1985); *Hayes v. Maggio*, 699 F.2d 198 (5th Cir. 1983). Petitioner has set forth no facts which would suggest that the prior statement was not voluntary.

13. *PETITIONER'S SENTENCE IS EXCESSIVE AND DISPROPORTIONATE*
14. *PETITIONER'S SENTENCE IS ARBITRARY AND CAPRICIOUS*
15. *ELECTROCUTION IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT*
16. *PETITIONER'S SENTENCE IS INVIDIOUSLY DISCRIMINATORY*
17. *CAPITAL PUNISHMENT IS AN EXCESSIVE PENALTY*
18. *THE CUMULATIVE EFFECT OF VIOLATIONS OF PETITIONER'S RIGHTS IS IN ITSELF A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS*

The grounds for relief raised in the above six claims are conclusory in nature. Petitioner offers no support in fact or law to justify their consideration.

RECOMMENDATION

It is recommended that the application for writ of habeas corpus filed on behalf of petitioner, Robert Sawyer, be DENIED and that the stay of execution be VACATED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 8 day of September, 1986.

/s/ Ronald A. Fonseca
RONALD A. FONSECA
United States Magistrate

MAR 2 1990

JOSEPH F. SPANIOLO, JR.
CLERK

No. 89-5809

In The
Supreme Court of the United States
October Term, 1989

ROBERT SAWYER,*Petitioner,*

vs.

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Caption omitted in printing)

ORDER

(Filed April 9, 1987)

The Court, after considering the petition, the record, the law applicable to the case, and the Magistrate's Finding and Recommendation, hereby approves the Magistrate's Finding and Recommendation and adopts it as its opinion, with the comments and corrections noted herein.

In view of the serious nature of the petitioner's allegations pertaining to the trial court's appointment of counsel with less than five years experience in violation of Article 512 of the Louisiana Code of Criminal Procedure, the Court makes the following additional comments:

The petitioner contends that the trial court's noncompliance with Article 512 of the Louisiana Code of Criminal Procedure deprived him of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution. We find it unnecessary to reach the merits of the petitioner's equal protection and due process claims, because even if the trial court's appointment of counsel with less than five years experience violated the petitioner's Fourteenth Amendment rights, the record reveals that the error was harmless beyond a reasonable doubt. Because we assume for argument's sake that an error was committed, we must now engage in a two-part analysis: (1) Can this type of error ever be treated as harmless, and (2) if so, was the violation harmless in this case.

Discussing the purpose and the application of the federal harmless error rule, the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), noted: "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23. The *Chapman* court gave examples of such "basic" constitutional rights: the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the right to be tried by an impartial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and the right to have coerced confessions deemed inadmissible at trial, *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). By contrast, there are other constitutional errors "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . . ." *Chapman*, 386 U.S. at 22.

The petitioner contends that the trial court's appointment of counsel with less than five years experience violated one of his "basic" constitutional rights therefore making a harmless error inquiry improper. Furthermore, the petitioner asserts that the harmless error principle can never be applied to due process or equal protection claims. We find no merit in petitioner's arguments. A due process or equal protection error, like most other constitutional errors, can be held harmless. See *Cancler v. Maggio*, 550 F.2d 1034 (5th Cir. 1977); *Hills v. Henderson*, 529 F.2d 397, 401-02 n.8 (5th Cir. 1976). The only time a harmless error inquiry is not appropriate is when the constitutional right violated is included in *Chapman's* "so

basic to a fair trial" category. Any right to five-year counsel in a capital case is not included in this category.

Our next inquiry is whether the trial court's appointment of counsel with less than five years experience constitutes harmless error in this case. The *Chapman* court pronounced that an error is not harmless where there is a "reasonable possibility" that the error complained of "might have contributed to the conviction". *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). The Court placed the burden upon the state to prove that the error was harmless. *Chapman*, 386 U.S. at 24. Although the Supreme Court continues to rely upon *Chapman* in its harmless error decisions, the Court has shifted its inquiry from whether the error "might have contributed to the conviction" to whether there was overwhelming independent evidence of guilt. Under the revised test, an error is harmless where, absent the error, the evidence was so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96, 108 (1983); *Brown v. United States*, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208, 215 (1973); *Milton v. Wainwright*, 407 U.S. 371, 377-78, 92 S.Ct. 2174, 2177-78, 33 L.Ed.2d 1, 6-7 (1972); *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). This overwhelming independent evidence test is consistent with the purpose of the harmless error rule as stated in *Chapman* - to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. Moreover, the United States Fifth Circuit has recognized

the overwhelming independent evidence test as the proper harmless error standard. *Germany v. Estelle*, 639 F.2d 1301 (1981), *Harryman v. Estelle*, 616 F.2d 870 (1980).

After examining the record, and the effect of the trial court's noncompliance with Article 512 in this particular case, we conclude that any error committed by the trial court in not appointing five-year counsel was harmless beyond a reasonable doubt.

In light of the recent United States Supreme Court ruling in *Lockhart v. McCree*, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) which addressed the same issue as that raised by Mr. Sawyer in ground ten of his application for habeas corpus relief, we find it necessary to comment upon the effect of that decision in the case at hand.

The petitioner has alleged that the state trial court's removal of a juror who expressed opposition to the death penalty deprived him of the right to have his guilt or innocence determined by a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. In January of 1986, this Court stayed the execution of the petitioner pending a ruling on the same issue by the United States Supreme Court in *Lockhart v. McCree*. The Supreme Court rendered its decision on May 5, 1986. The *Lockhart* court held that the removal of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors does not violate the requirement that a jury must represent a fair cross section of the community.

After carefully reviewing the record and transcript in this case, we conclude that the petitioner's claim is without merit. The record supports the state trial court's determination that the juror's opposition to the death penalty would have prevented her from properly and impartially applying the law to the facts, thereby substantially impairing the performance of her duties as juror.

The Court makes the following corrections to the Magistrate's Finding and Recommendation:

Page 1, lines 15-16: the citation should read "*Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)".

Page 6, lines 18: "even" should read "ever".

Page 7, line 31: "grounds" should read "ground".

Page 11, footnote 4, line 4: the citation should read: "*Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 n.1 (La. 1976)".

Page 14, line 5: the citation should read "*McCrae v. Blackburn*, 793 F.2d 684, 688 (5th Cir. 1986)".

Page 14, line 6: "more" should read "less".

Page 24, line 9: "of itself" should read "in itself".

Page 30, line 18: "[d]oes" should read "does".

Page 30, line 20: the citation should read "28 U.S.C. § 2254".

Page 34, line 37: "merely" should read "nearly".

Page 35, line 25: "the" should read "this".

Page 37, line 24: "the" should read "that".

Page 39, line 15: a comma should follow "specific intent".

Page 42, footnote 8, line 10: "inapposit" should read "inapposite".

Page 44, lines 15-16: the citation should read "*Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)".

Page 45, line 9: "constitutinal" should read "constitutional".

Page 45, footnote 9, line 6: "[a]dequately" should read "adequately".

Page 45, footnote 9, line 8: "offenses" should read "offenders".

Page 46, line 14: the citation should read "*Sawyer v. State*, 442 So.2d 1136 at 1139-40".

Page 49, line 5: "[t]he" should read "the".

Accordingly,

IT IS ORDERED that the application filed on behalf of petitioner, Robert Sawyer, is hereby DENIED.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on January 21, 1986 is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Harry A. Menty
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Caption omitted in printing)

JUDGMENT

For the reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of the defendant, Frank Blackburn, Warden, and against the petitioner, Robert Sawyer, dismissing the petitioner's application for a writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay of execution entered by this Court on January 21, 1986 be and is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Harry A. Menty
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Fifth Circuit

Robert SAWYER, Petitioner-Appellant,

v.

**Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.**

No. 87-3274.

June 30, 1988.

Order Granting Rehearing En Banc
Aug. 25, 1988.

Before GEE, KING and DAVIS, Circuit Judges.

KING, Circuit Judge:

Robert Sawyer appeals from the district court's denial of his petition for writ of habeas corpus, and its concomitant entry of an order rescinding Sawyer's stay of execution. On appeal, Sawyer argues that his conviction for first degree murder should be reversed both because he was denied effective assistance of counsel and because the state trial court, by failing to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar for at least five years, violated Sawyer's constitutional due process and equal protection rights. In addition, Sawyer argues that the prosecutor's closing argument in the sentencing phase of his trial violated the eighth amendment by erroneously misleading the jurors concerning their role as the final arbiters of death. As we agree with the district court that Sawyer's challenges to his conviction and sentence do not warrant habeas relief, we affirm the district court's judgment.

I.

Robert Sawyer ("Sawyer") is a state prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Sawyer and Charles Lane ("Lane") were charged with first degree murder for the gruesome slaying of Frances Arwood.¹ Both were ultimately tried

¹ The district court adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana in Sawyer's case:

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

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separately. Sawyer was represented at trial by his court-appointed attorney, James Weidner ("Weidner"). Sawyer

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The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his first, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her

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was originally represented by Wiley Beevers ("Beevers"). It was Beevers who had initially brought Weidner into

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with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-98.

the case by asking him to assist as co-counsel. Beevers subsequently withdrew from the case when Sawyer refused to accept a plea bargain offered by the prosecutor and Weidner was left as sole counsel. Upon receiving his appointment, Weidner informed the trial court that he was not a "death-qualified" attorney because he lacked five years experience as required for appointed counsel in capital cases by article 512 of the Louisiana Code of Criminal Procedure.² The trial court told Weidner to get an experienced counsel to "sit" with him. Weidner managed to secure some assistance from several other attorneys, but no "death-qualified" attorney was ever appointed as co-counsel. Neither party disputes the fact that the terms of article 512 were not complied with. Sawyer was convicted of first degree murder and sentenced to death by a jury on September 19, 1980.

His conviction and sentence were affirmed by the Louisiana Supreme Court. *See State v. Sawyer*, 422 So.2d 95 (La. 1982). Sawyer's petition for a writ of certiorari to the United States Supreme Court was granted and the case was remanded with instructions for the Louisiana Supreme Court to reconsider its ruling in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235

² Article 512 provides, In pertinent part:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall assign counsel for his defense. Such counsel may be assigned earlier, but must be assigned before the defendant pleads to the indictment. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

(1983). *See Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the death sentence, *see Sawyer v. Louisiana*, 442 So.2d 1136 (La. 1983), and Sawyer's subsequent petition for writ of certiorari was denied, *see Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). At this point, Sawyer sought state habeas relief which was ultimately unsuccessful. *See Sawyer v. Maggio*, 479 So.2d 360 (La. 1985); *Sawyer v. Maggio*, 480 So.2d 313 (La. 1985).

Having exhausted his state remedies, Sawyer filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. In his petition, Sawyer argued, among other things, that he received ineffective assistance of counsel, and that the state trial court's failure to comply with article 512 violated his due process and equal protection rights. Moreover, Sawyer claimed that the prosecutor's closing argument in the sentencing phase of his trial erroneously misled the jury as to their role as the final arbiters of death and, therefore, violated the eighth amendment. After granting Sawyer a stay of execution, the district court assigned Sawyer's case to a magistrate for a hearing. On September 9, 1986, the magistrate submitted his proposed findings and recommended to the district court that Sawyer's petition be denied and the stay of execution be vacated. With respect to Sawyer's ineffective assistance of counsel claim, the magistrate concluded that Sawyer had failed to demonstrate that he was prejudiced by any of Weidner's allegedly deficient actions as counsel. As to the state trial court's non-compliance with article 512, the magistrate

began by noting that the state trial judge, after the evidentiary hearing, concluded that the violation is not fatal to a capital conviction when the defendant actually received effective assistance of counsel. The magistrate, therefore, refused to reach the issue of whether Sawyer's due process and equal protection rights were actually violated "since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18 [1, 87 S.Ct. 824, 17 L.Ed.2d 705] (1967)." Finally, the magistrate concluded that the prosecutor's remarks in his closing argument during the penalty phase were distinguishable from those condemned in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as violative of the eighth amendment. Moreover, after concluding that "[r]eference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty," the magistrate went on to conclude that since "there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different," resentencing would be inappropriate.

On April 8, 1987, the district court issued its ruling adopting the magistrate's findings and recommendations in an order incorporating several amendments to the magistrate's opinion.³ The district court also examined, in

³ For the balance of this opinion, we will refer to the magistrate's findings and recommendations, as corrected by the district court, and the district court's additions to the magistrate's report collectively as the district court's conclusions.

greater detail, the question of whether *Chapman's* harmless error analysis applies to the alleged constitutional violations in the instant case. The district court concluded that a *Chapman* analysis was appropriate since the state trial court's failure to appoint counsel with five years experience could not be classified as a violation of constitutional rights "so basic to a fair trial" as to preclude the harmless error inquiry. The district court found no merit in Sawyer's assertion that harmless error analysis can never be applied to due process or equal protection errors. Finally, the district court found that the state trial court's appointment of counsel with less than five years experience in the instant case was indeed harmless since the evidence against Sawyer was so overwhelming as to establish his guilt beyond a reasonable doubt. Sawyer filed timely notice of appeal and was granted a certificate of probable cause to appeal and a stay of execution pending appeal. We have jurisdiction under Title 28, United States Code, section 2253.

II.

On appeal, Sawyer raises three challenges to his confinement and sentence. First, Sawyer argues that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was not lawfully qualified to represent a capital defendant," in violation of the sixth amendment. Next, Sawyer argues that the state trial court's failure to comply with article 512 violated Sawyer's constitutional due process and equal protection rights. He contends that the district court erred in applying a harmless error analysis to his claims for they are related to the integrity of the trial process itself and, as

such, are not proper subjects for a *Chapman* inquiry. Finally, Sawyer contends that certain improper remarks by the prosecutor in closing arguments at the sentencing phase of Sawyer's trial erroneously misled the jury as to their role in the death penalty determination, and, therefore, violated the eighth amendment as interpreted in *Caldwell*. Sawyer also takes issue with the district court's imposition of a prejudice requirement on his *Caldwell* violation claims. We will consider each of these arguments in turn.⁴

⁴ Sawyer also argues briefly that since the jury was allowed to weight an aggravating circumstance that was later held to have been improperly submitted, his death sentence was imposed in violation of the eighth amendment. Specifically, the jury found that Sawyer had previously been convicted of an unrelated murder because he was indicted in Arkansas for second degree murder in the killing of a child, and pled guilty to involuntary manslaughter for that crime. The Louisiana Supreme Court, however, ruled that a conviction for involuntary manslaughter could not support a finding that Sawyer had previously been convicted of an unrelated murder. *Sawyer*, 422 So.2d at 101. The Louisiana Supreme Court concluded that the evidence of Sawyer's prior conviction was properly admitted, however, and did not inject an arbitrary factor into the sentencing proceeding. *Id.* at 104. Sawyer's argument to the contrary is of no moment. As we have stated:

The fact that an invalid statutory aggravating circumstance has been found does not constitutionally impair a death sentence under the Louisiana procedure where the jury has also found another aggravating circumstance which is supported by the evidence and is valid under the law and of itself suffices (sic) to authorize the imposition of the death penalty.

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III.

A. Ineffective Assistance of Counsel

Sawyer points to a number of alleged deficiencies in Weidner's performance at trial as support for his allegation of ineffective assistance of counsel. Specifically, Sawyer noted that Weidner: (1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to

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James v. Butler, 827 F.2d 1006, 1013 (5th Cir. 1987); see also *Byrne v. Butler*, 845 F.2d 501, 501, 514-15 (5th Cir.1988).

Sawyer does not dispute that the jury properly found two other aggravating circumstances, namely that the crime was committed in a particularly heinous manner and that it occurred during the perpetration of arson. The Louisiana Supreme Court concluded that the evidence was clearly sufficient to support the jury's findings with respect to those aggravating circumstances, *Sawyer*, 422 So.2d at 101, and "[t]hat court's determination is entitled to great weight in our review," *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987). In fact, Sawyer does not argue that the evidence was insufficient to support the other aggravating circumstances. Those aggravating circumstances were sufficient to authorize the imposition of the death penalty and Sawyer has not challenged their legal validity in this case. Sawyer's sentence, therefore, was not constitutionally impaired by the submission of the invalid aggravating circumstance. See *Byrne*, at 515.

negate the specific intent required for first degree murder; (5) failed to make a closing argument, at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

Sawyer's claims of ineffective assistance of counsel must be evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The burden that *Strickland* imposes on a defendant is severe. *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir.1987). In order to satisfy the deficiency prong of the *Strickland* test, for example, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable. We have stressed that, "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.'" *Martin*, 796 F.2d at 816 (quoting *Lockhart v. McCotter*, 782 F.2d

1275, 1279 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987)).

In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors has some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czere v. Butler* 833 F.2d 59, 64 (5th Cir.1987). On the contrary. *Strickland* requires that the defendant affirmatively prove prejudice. *Id.* *Strickland* also authorizes us to proceed directly to the question of prejudice. Therefore, if Sawyer fails to demonstrate prejudice, the alleged deficiencies in Weidner's performance need not even be considered. See *Strickland*, 466 U.S. at 698-99, 104 S.Ct. at 2070; *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir.1984). Since both the performance and prejudice comments of the ineffectiveness inquiry are mixed questions of law and fact, we must make an independent determination of whether the representation accorded Sawyer by counsel passed constitutional muster. *Ricalday v. Procunier*, 736 F.2d 203, 206 (5th Cir.1984); *Trass v. Maggio*, 731 F.2d 288, 292 (5th Cir.1984). With these considerations in mind, we now turn to the merits of Sawyer's contentions.⁵

⁵ In addition to his specific allegations of Weidner's ineffectiveness. Sawyer also contends that Weidner's failure to meet article 512's standards for death qualification rendered

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With respect to Sawyer's objections to voir dire, we need not decide whether counsel's failure to question prospective jurors about their views on the death penalty was professionally unreasonable because Sawyer has failed to demonstrate prejudice. Sawyer does not dispute the fact that the State questioned the prospective jurors on this point. Rather, Sawyer asserts that because "the actual value of the rights [counsel] so casually sacrificed cannot

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his assistance as counsel unreasonable *per se* under "prevailing professional norms." See *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. Sawyer asserts that "prejudice from this form of inadequate representation may be presumed." We need not address the first contention for we do not agree with Sawyer that counsel's failure to meet the state law standard was presumptively prejudicial. In support of this proposition. Sawyer relies on language from *Strickland* to the effect that prejudice may be presumed: (1) where "prejudice . . . is so likely that case by case inquiry is not worth the cost;" and (2) where the impairment of the sixth amendment right is "easy to identify and, for that reason . . . easy for the government to prevent." See *id.* at 692, 104 S.Ct. at 2067. Sawyer's reading of *Strickland* as establishing a generally applicable two-pronged test for presumptive prejudice is clearly in error. The Court in *Strickland* included the aforementioned language merely to illustrate why it presumes prejudice where there has been an actual or constructive denial of the assistance of counsel altogether, or where the state has prevented counsel from assisting the accused during a critical stage of the proceedings. See *id.* (citing *United States v. Cronin*, 466 U.S. 648, 659 & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657 (1984)). The state trial court's failure to comply with article 512 did not result in an actual or constructive denial of the assistance of counsel. Therefore, we are unwilling to extend *Strickland's* limited relaxation of the prejudice requirement to the facts of this case. Sawyer's claims are subject to the general requirement that the defendant affirmatively prove prejudice.

be measured in concrete terms," *Strickland* would excuse his failure to affirmatively demonstrate – or concretely allege – prejudice from counsel's actions. Sawyer's novel interpretation of *Strickland* is unsupported by authority and runs counter to our interpretation of that case. Sawyer also alludes to the prejudice which resulted from counsel's failure to rehabilitate veniremen who were excused because of their views contrary to the death penalty. Sawyer fails, however, to demonstrate that rehabilitation was possible. Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of. We find no merit in Sawyer's allegations that counsel's voir dire performance constituted ineffective representation of counsel.

At trial, Weidner objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase. Sawyer asserts that he was prejudiced by this objection because "[w]ithout this information, the jury would never realize that a conviction for second degree murder carried a mandatory life sentence, so that a vote against first degree would both remove the possibility of a death sentence and also insure permanent incarceration." By objecting to the jury's receipt of this information, Sawyer argues, Weidner deprived his client of any realistic opportunity for a second degree murder conviction and a chance of avoiding the penalty phase of trial. The district court, however, concluded that Sawyer's argument was without merit since "it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder," and because Sawyer's "contention that the jury might have returned a verdict of

manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence."

Once again, Sawyer has failed to affirmatively demonstrate prejudice. He has not shown a reasonable probability that, absent Weidner's objection to the jury's learning of lesser penalties, the jury decision would have been different. We note first that the evidence adduced at trial was more than ample to support the jury's determination that Sawyer was guilty of first degree murder.⁶

⁶ As the district court noted, "[Sawyer] did not seriously contest at trial his involvement in the beating and burning of the victim." In any event, the testimony of Cynthia Shano, an eye witness to the incident, as well as the other testimony and physical evidence introduced at trial, provided a sufficient factual underpinning for the jury's verdict. The Louisiana Supreme Court found that: (1) "[t]here was . . . ample evidence from which a rational juror could have concluded beyond a reasonable doubt that [Sawyer] was engaged in the perpetration of aggravated arson;" (2) Sawyer's actions evinced the specific intent to inflict great bodily harm; and (3) the evidence was "plainly sufficient" to support the conviction. *State v. Sawyer*, 422 So.2d at 99. "That court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987).

Sawyer's chief defense at trial was that he lacked the specific intent to commit first degree murder due to intoxication. In reviewing this claim, the Louisiana Supreme Court concluded that "the jury reasonably rejected the defense." *State v. Sawyer*, 422 So.2d at 99. The Louisiana Supreme Court went on to hold that "[t]here was ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found that [Sawyer] acted with specific intent, despite his excessive consumption of alcohol." *Id.* Our review of the record shows this conclusion well supported by the evidence. Sawyer has failed to demonstrate otherwise.

Moreover, Sawyer fails to demonstrate a reasonable probability that the jury would have returned a verdict of guilty to either of the lesser offenses. Finally, as for avoiding the penalty phase of trial in hopes of securing a term of life imprisonment, Sawyer had consistently refused to accept such an offer by way of a plea bargain.⁷

⁷ Sawyer's assertions of prejudice are further belied by Weidner's testimony at the state habeas hearing. At the hearing, Weidner gave the following explanation for his actions:

A.

My reasoning was that I didn't want the jurors to know the penalty for manslaughter was, you know, was twenty-one years. I didn't want them to know that. And that was basically a concession to Robert Sawyer. He was - Robert was insisting that we argue for manslaughter. And in light of the facts of the case, you know, and I explained to Robert I had, you know, "You're asking me to blow whatever credibility I may be able to build with the jury by doing that, especially if they find out that it's a twenty-one year sentence. You know, it's a relatively light sentence: They're going to figure out real quick that you, you know, with the other things, that you could be out of jail relatively soon if they find you guilty of manslaughter."

So, kind of as a compromise between Robert, you know, I agreed we won't let them know what any of the penalties are. Let's try to set it up so that the jury knows that it's death or something else.

Q. So, Mr. Sawyer's anticipation in that area consisted of his instructing you to argue for manslaughter, and not for second degree murder?

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Next, Sawyer contends – however perfunctorily – that Weidner's failure "to object to inadmissible, inflammatory statements by the prosecutor" constituted an example of Weidner's prejudicial representation. Sawyer complains of Weidner's failure to object "to the prosecutor's use of facts not in evidence during voir dire, which facts were never established at trial." Specifically, Sawyer complains of references to the use of a hammer in the commission of the crime. The district court concluded that the prosecutor's reference to the hammer, when "viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict." Moreover, at trial, Weidner objected to the testimony of a state witness who alluded to the use of a hammer during the attack, and requested a mistrial. The trial court denied the request but instructed the jury that "until now there has been no testimony regarding any hammer by any other prior witness so I am going to ask you to disregard those comments and that statement by the witness and don't let that statement prejudice Mr. Sawyer in any way." Sawyer's assertion, therefore, is without merit.

Sawyer's next objection to Weidner's performance concerns counsel's use of expert testimony to support

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- A. Robert had consistently – he had been informed as late as the morning we began the trial that he could plead guilty to first degree murder without the death penalty. And he consistently refused and said "you tell them I will plead guilty to manslaughter and nothing else."

Sawyer's intoxication and toxic psychosis defenses. Sawyer complains that Weidner failed to secure his own expert witnesses and instead relied on "state" experts – psychiatrist who had been appointed to a pre-trial lunacy commission charged with determining whether Sawyer was competent to stand trial – who gave damaging testimony. Each of the psychiatrists in question examined Sawyer for approximately half an hour in connection with the competency proceeding and concluded that Sawyer understood the nature of the charges against him and could assist his attorney in his defense. Weidner was successful in eliciting testimony from them which supported the toxic psychosis defense.⁸ In his habeas

⁸ The following excerpts from the testimony at trial are instructive:

Q. [By Weidner to Doctor Albert DeVilliere] Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening. Robert Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.

A. What time?

Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continuing to drink MD 20/20 wine at that time. At some point during the next five to six hours some heinous acts occurred. At approximately 1:30 in

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petition, Sawyer complains that these opinions were based upon a set of hypothetical questions only, and that

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the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.

....

With the facts given to you from that hypothet, Doctor, can you render an opinion as to the condition you believe Robert Sawyer was in during the time.

A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.

....

Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?

A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways.

....

Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have

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Weidner should have procured an expert who could have testified as to the actual effect of alcohol on Sawyer. As'

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described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?

A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.

* * *

Q. [By Weidner to Doctor Genevieve Arneson] Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is as described by witnesses -

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

the district court noted, "[Sawyer] does not suggest that type of examination would produce the type of results he seeks or that those results would even be obtainable." In addition, Doctor Albert DeVilliere, one of the two experts, testified both at trial and during the sanity hearing that a physician would have to have been at the scene of the crime during its commission to be in a position to render an opinion on Sawyer's intent or the effect of toxic psychosis on that intent at the time of the crime. Finally, as the district court concluded, Sawyer has failed to demonstrate sufficient evidence that he suffered from toxic psychosis to support his claims. His assertions on this point, therefore, are without merit.

Sawyer also points to Weidner's waiver of closing argument at the guilt phase of trial. Sawyer asserts that "[a] failure to give a closing argument constitutes a clear breakdown in the adversary process under [*Strickland*] as the jury must infer that the defense counsel who waives argument has abandoned his client's case, and has nothing to say because he believes him to be guilty." Weidner testified during the state evidentiary hearing that his deliberate decision to dispense with closing argument was based on two separate considerations. First, having dealt with the prosecutor in other trials, Weidner knew that the prosecutor tended towards "mild" closing arguments and "saved all of his big guns" for rebuttal. Therefore, "all [Weidner] could see closing argument was going to do in the guilt phase of the trial was give [the prosecutor] a chance to come back behind [him], show them the picture again . . . and just make it worse." Second, Weidner realized the strong case the state had against Sawyer as to his guilt and felt that the best hope for

salvaging anything for Sawyer was in the penalty phase, where Weidner hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk his credibility with the jury by advancing arguments that the jury might perceive as unsupportable.

The district court concluded that "[w]hile an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do not find that to be the result in the case before us." We agree that the waiver of closing argument was not prejudicial on the facts before us. Weidner believed the evidence against Sawyer to be "overwhelming." That view seems to have been shared by all of the attorneys familiar with the case. Beevers, for example, was "convinced that there was overwhelming weight of evidence" against Sawyer and "[he] was concerned . . . about the high probability of a death penalty should [Sawyer] proceed to trial." Samuel Dalton, an attorney who testified for Sawyer at the state habeas evidentiary hearing, also recalled "that the evidence of the homicide was overwhelming." Moreover, we note that closing argument was not needed to organize and explain the defense position. The district court concluded that, "[u]nder the circumstances, the jury could not help but to have understood the nature of Sawyer's defense." After a thorough review of the record, we find no error in the district court's conclusion that the jury was fairly apprised of the nature of Sawyer's defense during voir dire and Weidner's opening statement, and that the testimony of defense witnesses as to aspects of the defense theory was simple and direct.

Sawyer's assertions of prejudice are unsupported by the record. He has failed to demonstrate what counsel might have said at closing that would have a reasonable probability of changing the result of the trial and therefore, in light of Weidner's tactical considerations and the strong evidence against Sawyer, we are unprepared to find that the waiver of closing argument here was prejudicial.

Finally, Sawyer contends that Weidner failed to prepare a competent penalty phase presentation. Specifically, Sawyer points to Weidner's alleged failure to conduct sufficient investigation and uncover relevant mitigating evidence. Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. For example, Sawyer complains that Weidner could have called other family witnesses who would have been available to testify about mitigating circumstances. Yet, Sawyer neither describes the substance of that potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law. He also complains that Weidner did not spend enough time preparing the witnesses to testify. It is clear, however, that brevity of consultation is insufficient to warrant habeas relief. *Schwander*, 750 F.2d at 499.

Sawyer also points to Weidner's closing argument as an example of attorney incompetence. In that closing, Weidner reiterated several dominant themes of his case: (1) that the jury bears a great responsibility and that they should be lenient by not "killing" Sawyer; (2) that the death penalty is improper under any circumstances; and

(3) that Sawyer lived through a difficult childhood, had been in a mental hospital and had been drunk during the commission of the offense. While Weidner's closing was, as the district court noted, cursory and perfunctory, Sawyer has failed to affirmatively demonstrate prejudice. The closing was adequate to inform the jury of the defense's position. In addition, Sawyer has not articulated how Weidner's closing affected the jury's decision or could have been improved. Weidner's penalty phase presentation was imperfect but Sawyer has failed to demonstrate that it was constitutionally improper under *Strickland*.

For the foregoing reasons, we conclude that since Sawyer has failed to affirmatively demonstrate prejudice from any of Weidner's allegedly deficient actions as counsel, Sawyer's ineffective assistance claim must fail.

B. *Equal Protection and Due Process*

Sawyer claims that the state trial court's refusal to comply with the terms of article 512 violated his rights to equal protection. We need not, and most certainly do not, reach the question of whether this violation of state law actually rose to the level of an equal protection violation. Even if Sawyer could prove an equal protection violation, that violation would still be subject to a harmless error analysis and, under such an analysis, would clearly fail.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the notion that errors of constitutional dimension necessarily require reversal of criminal convictions. *Id.* at 21-22, 87 S.Ct. at 826. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should

not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); see also *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Despite the strong interests that support the harmless error doctrine,⁹ however, the Court has recognized that some constitutional errors require reversal without regard to the evidence in the particular case. *Rose*, 106 S.Ct. at 3106. This limitation recognizes "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-828 (emphasis added).

The Court in *Rose* sought to clarify this notion:

The State of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

⁹ As the Court stressed in *Van Arsdall*:

The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

Rose, 106 S.Ct. at 3106 (citations omitted). Harmless error analysis, therefore, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (citing *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436). As the Court stated in *Rose*, "[e]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, or denied it altogether." *Rose*, 106 S.Ct. at 3106 n. 6. Therefore, "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Sawyer has failed to overcome that presumption.

We agree with the district court that a state law right to "death-qualified" counsel of five years experience is not included in *Chapman's* "basic to a fair trial" category. Sawyer concedes that the right to a five year attorney is not itself a federal constitutional right. He argues, however, that "the state's arbitrary abrogation of that right may give rise to an equal protection . . . violation." This federal constitutional right, the argument continues, is basic to a fair trial under *Chapman* "in the context of a breakdown in the state-guaranteed trial machinery in a capital case." We do not agree. The alleged constitutional violation in the instant case neither aborted the basic trial process nor denied it altogether, for Sawyer received the effective assistance of counsel.¹⁰ "The thrust of the many

¹⁰ The Court in *Rose* placed a great deal of emphasis on the error's potential effect on the factfinding process at trial. *Rose*,

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constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." *Id.* at 3107. Recognizing that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, we conclude that the state trial court's failure to comply with article 512 does not compare with the kind of errors that have been found to automatically require reversal of an otherwise valid conviction. Sawyer's equal protection claim, therefore, was properly subjected to a harmless error analysis by the district court.

Having determined that a harmless error analysis is appropriate in this case, we must turn to the question of whether the state trial court's appointment of counsel with less than five years experience was indeed harmless. An error is harmless where, after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the

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106 S.Ct. at 3106. Specifically, the Court emphasized the deleterious effect which errors such as judicial bias or denial of counsel might have on the composition of the record. *Id.* at 3107 n. 7. Where the error in question does not affect the record, "[e]valuation of whether the error prejudiced respondent . . . does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence." No such difficult inquiries are required in the instant case. The failure to appoint five year counsel did not affect the composition of the record in such a way as to prevent an appellate court from evaluating the potential harm to Sawyer.

accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96 (1983); *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. March 1981), *cert. denied*, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.), *cert. denied*, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980). Given the overwhelming evidence of guilt presented at Sawyer's trial, we agree with the district court that the state trial court's error was harmless beyond a reasonable doubt. Sawyer's equal protection claim, therefore, must fail.

Sawyer's due process claim is also meritless. Where there has been a violation of state procedure, the proper inquiry "is to determine whether there has been a constitutional infraction of the defendant's due process rights which would render the trial as a whole 'fundamentally unfair.'" *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711-12 (5th Cir.1986) (quoting *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A April 1981)). In order to show that his trial was fundamentally unfair, Sawyer must demonstrate that some prejudice resulted from the state trial court's failure to appoint counsel with five years experience. *See Manning*, 786 F.2d at 712. As we explained earlier, Sawyer has failed to demonstrate prejudice and, therefore, his claim must fail.¹¹

¹¹ In the instant case, the district court applied a harmless error analysis to Sawyer's due process claims and found that any alleged violation was in fact harmless. We have found that there was no due process violation, since Sawyer's trial was not rendered fundamentally unfair by the state trial court's failure to appoint death-qualified counsel. Therefore we need

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C. Caldwell Violation¹²

Finally, Sawyer maintains that certain remarks by the prosecutor in closing argument at the punishment stage of his trial violate the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and require that his sentencing process be redone.

Caldwell is a rule of narrow application. It applies only to comments that mislead a jury in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision. *Darden v. Wainwright*, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15. The rule is well illustrated by the case in which it was laid down.

In *Caldwell*, the defendant had murdered the female proprietor of a small, rural bait and grocery store in the course of a robbery. Defense counsel, unable to find much comfort in relevant fact or law, took refuge in rhetoric, dwelling at some length on the Sixth Commandment, the Savior, the Crucifixion, mercy, forgiveness and certain of

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not decide whether the district court's analysis was appropriate. We note that there are certain conceptual difficulties inherent in applying a *Chapman* analysis to a due process claim for, if the violation of state law rendered the trial fundamentally unfair, it would seem that the violation could never be harmless. Because we find no due process violation in the case at bar, however, we see no need to reconcile the conceptual difficulties, or to determine whether harmless error analysis can ever be appropriately applied to a due process claim.

¹² The remainder of the opinion and the result represent the views of the panel majority, Judges Gee and Davis. The views of Judge King are set forth in her appended dissent.

the less desirable aspects of being electrocuted. In response, the prosecuting attorney attacked the defense for cynically heaping undue responsibility upon the jury, while the judge concurred – overruling an objection to the argument and directing its continuance:

ASSISTANT DISTRICT ATTORNEY: Ladies and Gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that *your decision is not the final decision*. My god, how unfair can you be? *Your job is reviewable. They know it.* Yet the . . .

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, *go on and make the full expression so the jury will not be confused*. I think it proper that the jury realizes that it is *reviewable automatically* as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, *insinuating that your decision is the final decision* and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and *as Judge Baker has told you*, that the decision you render is *automatically reviewable* by the Supreme Court.

Automatically, and I think it's unfair and I don't mind telling them so.

Caldwell, 472 U.S. at 325-26, 105 S.Ct. at 2637-38 (emphasis added).

The Supreme Court, speaking through Justice Marshall – whose consistent view has long been that capital punishment is forbidden by the Constitution in any case whatever – declared this capital sentence unenforceable because it was imposed by a jury that had been misled by the judge and prosecutor about its critical and central role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

A considerable extension of *Caldwell* would be required to accommodate Sawyer's contentions. In our view, a most critical factor in *Caldwell* was the trial judge's approval and encouragement of the prosecutor's tendentious response to defense counsel's spread-eagled oratory.¹³ As our Brethren of the Eleventh Circuit have observed:

Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus . . . mandating reversal.

¹³ No criticism is implied; counsel had few, if any, other courses open to him and did what he could for his client with his back to the wall.

Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), cert. denied, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987).

The Supreme Court took a similar view of the passage, observing that the judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. The comparable proceedings here, while falling short of perfection as do most actual trials, are a far cry from those in *Caldwell*. The respect in which they approach it most closely is in the remarks of the prosecutor; in all other respects of significance, they resemble if not at all. We do not condone the remarks in question and we shall discuss them in a moment. Before doing so, however, we think it appropriate to attempt to put the rule of *Caldwell* into a broader context and to sketch out a general approach for dealing with alleged breaches of it.

A general survey of the authorities indicates, as common sense supports, that the *Caldwell* problem results from prosecutorial attempts to counter a particular set of last-resort arguments by the defense in capital cases. Given that in most such cases verdicts must be unanimous, it necessarily follows that, when all else seems lost, counsel may seek to persuade at least one juror (if no more) that: he or she is being asked to "kill" the defendant, that killing is always wrong, that even evidence that seems absolutely conclusive is sometimes not, that at its best human judgment is fallible, that if the defendant is

erroneously executed no correction of the error is possible, and that at all events mercy is better than retribution. Taken together, these are formidable arguments, arguments that can be made in any case whatever, arguments all of which are in varying degrees true. One response which they sometimes evoke from the prosecutor is an exhortation to the jury to view its responsibility as a joint, rather than an individual, one; and several varieties of that response were made in this case, two permissible, one dubious.

The first called on the jury to view itself as the representative of the citizenry, as "we the people," declaring by its verdict that the acts of the defendant in torturing his victim to death were intolerable and should call down upon him the full force of the law. Another such argument appealed to their group spirit as jurors, assuring them that they did not stand alone in whatever they did but rather functioned together as an institution:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so.

So far, so good; fair argument.

The next sentence, however, embarks upon a far different and more dubious sort of "joint responsibility" argument, one that vaguely and generally reassures the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong. . . ." Who these "others" were, the jury was not told. In addition, at various points in the argument the prosecutor improperly

referred to the jury's verdict as a "recommendation," and at another as "only the initial step." No objection was made by the defense at any of the foregoing points.

Following them, however, defense counsel advised the jury in his closing argument that:

The decision whether Robert Sawyer lives or dies is in your hands. . . .

I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. . . . I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

After the prosecutor's closing argument, in which he advised the jury that it really had no choice but to recommend the death penalty, "no matter how unpleasant or how difficult this type of decision may be for you to make," the judge charged the jury in standard form, directing them to the evidence as the basis for their decision, describing their forthcoming verdict in one place as a recommendation of sentence and at the other as the imposition of one, and concluding:

It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or life imprisonment. Go with Mr. Miller back in the jury room.

So much for the circumstances of how the jury was advised. We turn now to the law.

The vice in the argument against which *Caldwell's* rule is directed is not so much that it minimizes the jury's

role in the capital sentencing procedure as that it minimizes it untruthfully.¹⁴ It is all too likely that a lay juror who has been told that panel after panel of judges – right up through the Supreme Court – will automatically “review” his verdict may believe that they “review” it as he decided it, in a plenary fashion. Were he told that the “review” would not at all directly concern itself with the central issue before him, life or death for the accused, he would necessarily feel far less reassurance at the prospect. Where, however, a reading of the record makes clear that the jury was told that the life-or-death decision was up to them and that execution could not be exacted without their permission, we think that *Caldwell* is satisfied.

We think it plain that this was the case as to Sawyer. Both the prosecution and the defense, as well as the trial judge, advised Sawyer’s jury that if it chose life imprisonment as its verdict, that was the end of the matter. The defense implored them to do so, and the prosecution – despite various ambiguous statements indicated above – told them it was up to them: “The decision is in your hands.”

In the last analysis, the fundamental question, in this as in other habeas cases involving prosecutorial remarks complained of, is whether the petitioner has demonstrated that the remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden*, 477 U.S. at 181, 106 S.Ct. at 2472, 91

¹⁴ See Justice O’Connor, concurring partly and separately in *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

L.Ed.2d at 157 (quoting from *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In a *Caldwell* situation, however, we agree with our Brethren of the Eleventh Circuit that because the prosecutor’s remarks typically amount to a mis-instruction to the jury on the legal effect of their verdict, the reaction to them of defense counsel and trial judge are of especial importance:

Of critical importance in *Caldwell* was the fact that the trial judge approved of the prosecutor’s comments, stating that it was proper that the jury be told that its decision was automatically reviewable. See *id.*; *Caldwell v. Mississippi*, 472 U.S. at 325-26, 105 S.Ct. at 2638. Because of the trial judge’s agreement with the prosecutor’s comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the Eighth Amendment’s heightened requirement of reliability in a capital case and mandating reversal.²

² The Court in *Caldwell* noted that in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the trial judge took special pains to correct the prosecutor’s impropriety, giving the jury a strong curative instruction. In contrast, in *Caldwell*, the trial judge “not only failed to correct the prosecutor’s remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor’s portrayal of the jury’s role was correct.” *Caldwell v. Mississippi*, 472 U.S. at 2645, 105 S.Ct. at 340. *Tucker*, 802 F.2d at 1295.

Indeed, the only instance of reversal for a *Caldwell* violation in our Circuit to which we are cited or which

our researches have located is *Wheat v. Thigpen*, 793 F.2d 621 (1986), in which the trial court approved the making of such an argument over defense counsel's objection:

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your work, and see if you've made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back and tell us to try it over, because some one made a mistake.

BY MR. STEGAL: May It Please The Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because it's wrong, they're gonna send it back. That's not right. I'm gonna object.

BY THE COURT: I think the argument was allowed – it was opened up on your argument. I'll overrule it.

793 F.2d at 628.

In so stating we do not, of course, intend to say that reversal is never appropriate in the case of a *Caldwell*-type misstatement unless it has been futilely objected to be endorsed as proper or correct by the trial judge. Each case must be evaluated on its own facts and circumstances; and it is not impossible to imagine statements by a prosecutor that, even absent an objection, minimize the jury's role to such a degree as require reversal if left uncorrected. Even in *Caldwell*, however, where the trial court had overruled an objection and in doing it expressly endorsed the prosecutor's minimizing remarks, the Supreme Court emphasized that his remarks were "quite

focused, unambiguous, and strong." 472 U.S. at 340, 105 S.Ct. at 2645. And indeed they were: beginning with two accusations of duplicity on the part of the defense, the argument proceeds through an attack focused on the defense's "insinuating" that the jury's decision was final, invokes the trial judge's already expressed approval of its somewhat misleading statements, and winds up by assuring the jurors that the decision is "automatically reviewable by the Supreme Court." By contrast, the prosecutor's vague references in today case to "others who will be behind you and the like pale into relative insignificance.

The prosecutor in today's case indulged in no claim that the defense was disingenuously or cynically attempting to mislead the jury, as did his comparable figure in *Caldwell*. Nor did counsel raise any objection, futile or otherwise, to any of the prosecutor's remarks to which Sawyer now takes exception; and the trial court neither approved nor endorsed them. By contrast to the prosecutor's statements in *Caldwell*, which were quite focused, unambiguous and strong – trumpeting automatic review by the Supreme Court and accusing the defense of deliberately misleading the jury as to its role – these were vague and ambiguous. And although we agree with the federal district court that the prosecutor's remarks complained of were improper, we also agree that they did not constitute reversible error – error that so infected the trial as to deny due process.¹⁵

¹⁵ The dissent in *Tucker* argued for a "no effect" standard for reversal, based on a concluding phrase at 472 U.S. at 341, 105 S.Ct. at 2646 in the *Caldwell* majority opinion, "Because we

(Continued on following page)

IV.

For the foregoing reasons, we AFFIRM.

KING, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that the prosecutor's undeniably improper remarks about the finality of the death penalty determination did not violate the eighth amendment as interpreted and applied by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). I have several

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cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires." 802 F.2d at 1298.

There is no gainsaying that the phrase appears in *Caldwell*, or that it can be read as Judge Kravitch and her two companions in dissent would read it. For a variety of reasons, however, we are not persuaded that the Court intended to impose such a well-nigh impossible burden upon the State as one to show, on pain of reversal, that any remark by a prosecutor in argument that might have a tendency to minimize the jury's sense of responsibility in a capital case had "no effect" on its sentencing decision. Such a test, for example, would make objecting a doubtful tactic, for an objection might bring a correcting instruction or one to disregard, thus removing the remark as a valid ground for appeal. Nor do we see how such a "no effect" test can lie in bed with the requirement, reiterated after *Caldwell* in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144, 157 (1986), that to obtain habeas relief on the basis of improper remarks by the prosecutor, petitioner must show that they so infected the trial as to deny due process.

major concerns with the majority's analysis. First, by applying the fundamental fairness test of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), instead of the "no effect" test of *Caldwell*, the majority has reviewed the prosecutor's comments in this case under the wrong standard. Second, by holding that "a most critical factor in *Caldwell* was the trial judge's approval" of the prosecutor's remarks, the majority has adopted an artificially narrow and incorrect interpretation of *Caldwell* – an interpretation which effectively eviscerates the holding in that case. Third, the majority has also mischaracterized the prosecutor's comments here in order to force them outside the ambit of *Caldwell*. And finally, the majority has erroneously implied that other remarks by the trial court, prosecutor and defense counsel were sufficient to cure the comments of any constitutional impropriety.

The Prosecutor's Argument

The majority opinion gives the facts of the alleged *Caldwell* violation short shrift. But I think it is important to understand exactly what the prosecutor said here. The comments at issue were made by the prosecutor in his closing argument at the sentencing phase of Sawyer's capital trial. The prosecutor, in describing the jury's role, remarked:

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people*

as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).*

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).

Caldwell, Donnelly and Darden

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 105 S.Ct. at 2639. The Court noted that the capital sentencing scheme is premised on a "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' [which allows the] Court to view sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Id.* at 330, 105 S.Ct. at 2640 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Court went on to specify a number of "specific reasons to fear substantial unreliability as well as bias in favor of death sentences

when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.¹ Turning to the facts before it, the Court concluded that the prosecutor's comments sought to give the jury a view of its role in the capital sentencing procedure that

¹ Initially, the Court recognized that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do – limits that jurors often might not understand." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 240. The Court also noted that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. this desire might make the jury very receptive to the prosecutor's assurance that it can freely 'err because the error may be corrected on appeal.' " *Id.* at 331, 105 S.Ct. at 2641 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. the sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather, the decision would present "the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns" – namely the desire to avoid responsibility for the decision. *Id.* Finally, given the fact that a capital sentencing jury is "made up of individuals placed in a very unfamiliar situation and called on to make a difficult and uncomfortable choice," an uncorrected suggestion that the ultimate determination of death rests elsewhere presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 105 S.Ct. at 2642.

was fundamentally incompatible with the eighth amendment's heightened need for reliability. *Id.* at 340, 105 S.Ct. at 2645. As the Court "[could not] say that [the State's] effort had no effect on the sentencing decision," it was compelled to vacate the death sentence. *Id.* at 341, 105 S.Ct. at 2646.

In reaching its conclusion, the Court was careful to distinguish, on two separate grounds, the fourteenth amendment fundamental fairness inquiry of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), from the case before it. First, the trial judge in *Donnelly* had agreed that the prosecutor's remarks in that case were improper and had given the jury a strong curative instruction. By contrast, in *Caldwell*, the trial judge not only failed to correct the prosecutor's remarks, but in fact openly agreed with them. *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. Second, the prosecutor's remarks in *Donnelly* were ambiguous and did not so prejudice a specific constitutional right as to amount to a denial of that right. The remarks in *Caldwell*, in contrast, "were quite focused, unambiguous, and strong" and "were pointedly directed at the issue that [the] Court has described as 'the principal concern' of [its] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." *Id.* at 340, 105 S.Ct. at 2645 (citation omitted).

The Court subsequently clarified the reach of *Caldwell* and *Donnelly* in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden*, the Court was confronted by a variety of challenges to the prosecutor's closing argument at the guilt phase of a capital murder trial. The Court relied on *Donnelly* in treating the

relevant question as "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). The *Darden* majority was quite careful, however, to distinguish the facts in front of it from those in *Caldwell*.² The *Darden* Court specifically limited *Caldwell* "to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 106 S.Ct. at 2473 n. 15. As the prosecutor's comments in *Darden* did not mislead the jury as to its role in the sentencing decision, *Caldwell* was inapplicable.

Standard of Review

I differ with the majority on the appropriate standard by which to review the comments at issue here. The majority, relying on *Darden* and *Donnelly*, holds that the

² In *Darden*, the Court wrote that:

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden, 106 S.Ct. at 2473 n. 15.

fundamental question, in this case as in other habeas cases involving improper prosecutorial comments, is whether the petitioner has demonstrated that the remarks rendered the trial fundamentally unfair so as to deny due process.³ A fair reading of *Caldwell* and *Darden* cannot support this conclusion.

³ The genesis of this proposition may be found in the Eleventh Circuit's decision in *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir.1986) (en banc), cert. denied, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). In *Tucker*, the court "borrowed" the prejudice prong of *Strickland* in order to apply the *Donnelly* fundamental fairness standard to *Caldwell*-type violations. See *Tucker*, 802 F.2d at 1295. That decision was roundly criticized by three judges in dissent. The dissenting opinion in *Tucker* discussed a number of shortcomings in the Eleventh Circuit's approach. The dissent noted, for example, that *Strickland* and *Caldwell* are fundamentally different in their assignment of the burden of proving prejudice. *Tucker*, 802 F.2d at 1298 (dissenting opinion). Unlike *Strickland*, *Caldwell* places the prejudice burden on the State. "Once the petitioner has shown that the prosecution attempted to minimize the jury's responsibility at the capital sentencing hearing, the state must show that 'this effort had no effect on the sentencing decision.'" *Id.* (quoting *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646). The dissent also stressed that while "the government is not responsible for, and hence not able to prevent, [defense] attorney errors that will result in reversal," see *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, "the state can control prosecutorial conduct and, in the capital sentencing context, is constitutionally obligated to do so." *Tucker*, 802 F.2d at 1298 (dissenting opinion). Finally, the dissent found it significant that the Supreme Court itself "did not apply its *Strickland* prejudice analysis to *Caldwell*'s claim of prosecutorial misconduct at sentencing but instead reaffirmed the long line of cases requiring heightened reliability in capital sentencing proceedings." *Id.*

In *Caldwell*, the Court wrote: "Because we cannot say that this effort [to minimize the jury's sense of responsibility for determining the appropriateness of death] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341, 105 S.Ct. at 2646. The majority, while recognizing that the phrase exists and that the "no effect" test is a plausible interpretation of the Court's language, concludes, for a variety of reasons, that the Court could not have meant to place a higher burden on the State in an eighth amendment *Caldwell*-type situation than would otherwise be borne under the due process jurisprudence of *Donnelly* and its progeny. I find the majority's reasoning unpersuasive.

The majority argues that the adoption of the "no effect" test would impose a "well-nigh impossible burden upon the state." According to the majority, the State would be forced to show that *any* remark which tended to minimize the jury's sense of responsibility in a capital case had no effect on the sentencing decision. That is not so. In order to qualify as a *Caldwell* violation, the prosecutor's remarks concerning the jury's role must be "focused, unambiguous and strong." *Id.* at 340, 105 S.Ct. at 2645. Moreover, the remarks would typically be made at the sentencing phase of trial rather than during voir dire, see *Byrne v. Butler*, 845 F.2d 501, 509 (5th Cir. 1988), or during the guilt-innocence stage, see *Darden*, 106 S.Ct. at 2473 n. 15. Finally, the remarks must not be corrected by an appropriate instruction from the trial court. *Caldwell*'s "no effect" test, therefore, is limited to a subset of particularly forceful prosecutorial comments on a narrow topic, generally presented to a capital jury at the sentencing

phase of trial, which are not corrected by the trial court. So, while the burden on the State may in fact be "well-nigh impossible," it is borne only in a narrow class of cases.

The majority also argues that the "no effect" test cannot be squared with *Darden*'s reaffirmation of the *Donnelly* test in *most* cases involving improper remarks by a prosecutor. The principles of *Caldwell*, however, were not applicable in *Darden*. *Darden*, 106 S.Ct. at 2473 n. 15. Since the prosecutor's comments in *Darden* could not have misled the jury into thinking that it had a reduced role in the sentencing process, any eighth amendment argument was unconvincing and the Court felt free to apply the more generally applicable due process standard of review. *Darden* did not hold that the *Donnelly* standard should be applied to *Caldwell* violations. If it had, the Court would not have needed to go to such great lengths to distinguish *Caldwell*.⁴ See *id.* It is clear, therefore, that in the peculiar eighth amendment context of the *Caldwell* violation a stricter standard of review applies.⁵

⁴ By reviewing Justice Blackmun's dissenting opinion in *Darden*, which was joined by three of the other four members of the *Caldwell* majority, the error in the majority's analysis can be readily discerned. In *Darden*, the dissent charged that the Court rejected "the 'no effect' test set out in *Caldwell*" without identifying which standard it was using. *Darden*, 106 S.Ct. at 2480 (Blackmun, J., dissenting). The Court responded to the dissent's charges by distinguishing *Caldwell* so that it could apply the *Donnelly* standard to the facts before it. At no point, however, did the Court take issue with the dissent's characterization of the *Caldwell* standard as a "no effect" test.

⁵ Justice Rehnquist, in his dissenting opinion in *Caldwell*, clearly believed that the Court had rejected the *Donnelly*

Prosecutorial comments which truly qualify as *Caldwell* violations cannot be reviewed under the *Donnelly* standard.⁶

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standard. Justice Rehnquist "[found] unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the [prosecutor's] statements," and concluded that "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable." *Caldwell*, 472 U.S. at 350-51, 105 S.Ct. at 2650-51 (Rehnquist, J., dissenting). Justice Rehnquist chided the Court for not heeding the directives of *Donnelly* and for not applying a fundamental fairness test. *Id.*

⁶ The panel's discussion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), underscores the error in the majority's adoption of a fundamental fairness standard in this case. In *Chapman*, the Court recognized that some errors necessarily render a trial fundamentally unfair. *Rose*, 106 S.Ct. at 3106. There are certain constitutional protections so basic to a fair trial that without them, a criminal proceeding cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and the criminal sanction may not be regarded as fundamentally fair. *Id.* Such errors either abort the basic trial process or deny it altogether. *Id.* at n. 6. The *Caldwell* violation presents a clear example of a breakdown in the trial process. The pernicious effects of focused, unambiguous and strong prosecutorial remarks concerning the jury's role in the sentencing process and the inevitability of appellate review are impossible to measure. Consequently, where such remarks are left uncorrected by the trial court, there is an intolerable danger that they affected the sentencing decision. For all the reasons reviewed by the Court in *Caldwell*, such remarks create an unacceptable risk of systemic breakdown, thereby poisoning the reliability of the death sentence.

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Nature of a Caldwell Violation

I also differ with the majority's description of the nature of what has come to be called a *Caldwell* violation. Not content with *Darden's* express limitation of *Caldwell* to a particular type of prosecutorial comment at the sentencing phase of trial, the majority would further restrict the reach of *Caldwell* to those rare instances in which the trial court expressly approves the prosecutor's improper remarks. Essentially, the majority would make the trial court's imprimatur a prerequisite to finding a *Caldwell* violation. The majority's position is based on a tortured reading of *Caldwell*.

The majority ignores the fact that the Supreme Court framed the *Caldwell* issue throughout the majority opinion solely in terms of the prosecutor's remarks:

In this case, a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari . . . to consider petitioner's contention that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's 'heightened need for reliability. . . .'

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Given that the eighth amendment demands a heightened degree of reliability in any case where the State seeks to take the life of a defendant, the prosecutor's remarks necessarily rendered the proceedings fundamentally unfair. It is our inability to measure the effect of such remarks, combined with the very grave threat to the integrity of the proceedings posed by such remarks, that militates in favor of the "no effect" test.

Caldwell, 472 U.S. at 323, 105 S.Ct. at 2636 (emphasis supplied). The majority opinion in *Caldwell* is divided into approximately thirteen parts and subparts, and the only mention of the trial court's endorsement of the prosecutor's remarks is in Part IV-C of the opinion in which the court sought to distinguish *Donnelly*. While the court did note that the trial judge had approved the remarks in the case before it, it did not establish that fact as a prerequisite to its ultimate condemnation of the prosecutor's actions. Rather, the Court identified *two* important factors which distinguished *Donnelly*. First, the Court looked at the trial court's actions and found that, unlike in *Donnelly*, the trial court not only failed to correct the improper remarks, it also endorsed them. *Id.* at 339, 105 S.Ct. at 2645. Next, the Court looked to the character of the remarks and determined that the prosecutor's comments differed from those in *Donnelly* because they were "focused, unambiguous, and strong" and because they prejudiced a specific constitutional right, i.e., an eighth amendment right, *Id.* at 340-41, 105 S.Ct. at 2645-46. The Court went on to confirm that such comments, *if left uncorrected*, might so affect the fundamental fairness of the sentencing proceeding as to violate the eighth amendment. *Id.*

Given *Caldwell*'s overwhelming emphasis on the character and effect of the prosecutor's argument itself,⁷ the

⁷ Justice O'Connor, in her concurring opinion, noted that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.* at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring). Justice O'Connor's concurring

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question of whether the trial court endorsed the comments must be viewed as merely a factor in a larger inquiry. A proper inquiry must focus on the nature of the prosecutor's remarks themselves *and* on the character of the trial court's response to those remarks. Moreover, an evaluation of the trial court's response is not limited to the question of whether the trial court endorsed the remarks. Were this not the case, the Court's references to curative action would be superfluous for silence would be sufficient medicine for what ailed the proceedings. I do not think *Caldwell* can fairly be read, therefore, as holding that the trial court's endorsement of the prosecutor's remarks is a prerequisite to finding an eighth amendment violation.

Nature of the Prosecutor's Remarks

The majority, casting the prosecutor's remarks in a more favorable light than they merit, weaves the threads of an admittedly "improper" argument into a harmless tapestry of vague, disjointed and forgiveable⁸

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opinion focused exclusively on the prosecutor's remarks, never once mentioning the trial court's endorsement of those remarks.

⁸ The majority also strives to justify the prosecutor's remarks on the ground of practical necessity. Prosecutors need such arguments, the majority suggests, to deal with the "formidable" argument, typically urged as a "last-resort" by struggling defense counsel, that the decision whether the defendant merits execution rests with each individual juror, that human judgment is not infallible, that mistakes can be made and that death is one error which cannot be corrected. The majority

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prosecutorial comments. My own review of the record has led me to conclude that the prosecutor's remarks in the instant case are sufficiently similar to those found constitutionally wanting in *Caldwell* as to merit vacation of Sawyer's sentence.

In the instant case, the prosecutor told the jury:

Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you

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points out, as it must, that such arguments are "in varying degrees" true. Those weighty factors, however, are precisely the sort of considerations which society has entrusted the jury to weigh in reaching its decision. Those decisions are at the core of the heightened need for reliability demanded by the eighth amendment of sentencing proceedings in capital trials.

The prosecutor is free to emphasize the collective nature of the jury decision. He is also free to emphasize that the defendant himself bears the responsibility for the consequences of his actions. The prosecutor most certainly made those arguments in this case. The prosecutor is not free, however, to diminish the jury's sense of the finality of their decision by repeatedly alluding to the specter of appellate review. By doing so, the prosecutor may well leave the jurors with the notion that their moral judgment in favor of death will be reviewed for error. See *Caldwell*, 472 U.S. at 340 n.7, 105 S.Ct. at 2645 n. 7. This may hold true even when the prosecutor has stressed that "the decision" is in the jury's hands for "the decision" in that case would be the decision to send a message, or the decision to start the ball rolling, or the decision that the jury wants the case reviewed. See *id.* at 330-33, 105 S.Ct. at 2640-41. It would not be the decision demanded by society and required by the eighth amendment: that the defendant merits execution because death is the appropriate punishment for the crime he has committed.

are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong. . . .

While the majority is arguably correct in dismissing the first portion of this comment as a permissible "joint-responsibility" argument, it is remiss in not recognizing the answer to the query it asks with respect to the latter portion: who are the "others" who will be behind the jury to agree with their decision or correct them if they are wrong? The answer is suggested in an earlier comment by the prosecutor:

. . . what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body . . . are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty.

Just as the *Caldwell* prosecutor referred to the ultimate reviewability of the jury's determination, so too did the prosecutor here make several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. As if the intended suggestion was not already clear enough, the prosecutor went on to hammer home his point by explicitly referring to judicial review and by couching his description of the jury's decision in language bespeaking possibility rather than finality:

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day. . . . All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

The contested remarks here are precisely the sort of comments condemned in *Caldwell* as tending to impart to the jury a view of its role in the capital sentencing procedure that is fundamentally incompatible with the eighth amendment's heightened need for reliability in the death sentence determination. It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecutor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous, and strong." See *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645. The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination. The message of non-finality was clear.

The Trial Court's Response

Having determined that the prosecutor's remarks were inappropriate under *Caldwell*, a question remains whether subsequent action by the trial court was sufficient to preclude reversal. See *Caldwell*, 472 U.S. at 339-40, 105 S.Ct. at 2645; see also *Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 310, 98

L.Ed.2d 268 (1987). The majority notes that the trial court delivered a standard form jury instruction informing the jury that it was their responsibility to deliver a sentence of death or life imprisonment. While that much is true, it is equally clear that the trial court did little if anything to correct the damage that was done. This is particularly so with respect to the prosecutor's comments regarding appellate review. Even if the trial court's instructions left the jury with the view that they had an important role to play, they did nothing to undermine the prosecutor's suggestion that the jury's determination would be reviewed by an appellate court to assure its correctness. See *Caldwell*, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n. 7.

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument. I do not presume to establish a general standard by which to judge the efficacy of a trial court's curative instructions in a *Caldwell* violation context. I merely note that in the instant case, the trial court's instructions⁹ were

⁹ The majority, in an effort to bolster its position that the prosecutor's remarks were later "cured", points to the fact that defense counsel informed the jury that "[t]he decision whether Robert Sawyer lives or dies is in your hands." That remark was patently insufficient to relieve the jurors of any mistaken impressions they might have held as to their role in the death penalty determination. In fact, any initial confusion by the jury might well have been exacerbated by defense counsel's espousal of a position contrary to that which the prosecutor seemed to embrace. The jury may have understood the remark, made just after the prosecutor had finished insinuating that the jury's decision was not final, to signify the existence of a true

insufficient to disabuse the jury of the notion that final responsibility for the sentencing decision might lay elsewhere.

In summary, because I believe that the prosecutor's effort to minimize the jury's sense of responsibility for determining the appropriateness of death cannot be said to have had no effect on the sentencing decision, I believe that the writ must be granted as to the sentence imposed upon Sawyer. I dissent from the majority's decision to affirm the district court's denial of the writ.

ON SUGGESTION FOR
REHEARING EN BANC

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

(Continued from previous page)

dispute on the role of the jury. Therefore, defense counsel's remark, when considered along with the prosecutor's earlier comments, may well have added to the cloud of uncertainty billowing around the jury about its own role. Consequently, the majority's reliance on the curative properties of defense counsel's remark is misplaced.

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

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March 30, 1989

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New Courthouse
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No. 87-3274 - Sawyer v. Butler

(USDC No. CA-86-0223 - "I" (4))

Dear Counsel:

The En Banc court requests that counsel in this case submit additional briefs discussing the relevance of the Supreme Court's recent decision in *Teague v. Lane*, 57 U.S.L.W. 4233 (1989), to Sawyer's petition. The Court wishes to know whether *Teague* precludes Sawyer from raising *Caldwell* issues in a collateral attack on his conviction. Counsel should address the following questions, although they need not limit themselves to these questions:

1. Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test? In answering this question, please discuss the significance of the Louisiana cases dealing with prosecutorial argument that diminishes the responsibility of a capital jury. See, e.g., *Steve v. Willie*, 410 So.2d 1019 (La. 1982). The Court wishes to know whether these cases rest upon state law rules, or upon the Eighth Amendment to the Constitution, and what effect, if any, they have upon the newness of Sawyer's *Caldwell* claim for *Teague* purposes.

2. Does *Teague* apply to collateral attacks upon a sentencing proceeding in a capital case?

3. Does *Caldwell* announce a rule that falls within the "fundamental fairness" exception to the *Teague* rule?

Sawyer's brief should be filed on or before May 12.
Louisiana's brief should be filed on or before May 19.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

by /s/ Amanda K. Vockroth
Amanda K. Vockroth
Case Manager

AKV/dme

United States Court of Appeals,
Fifth Circuit.

Robert SAWYER, Petitioner-Appellant,

v.

Robert H. BUTLER, Sr., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

No. 87-3274.

Aug. 15, 1989.

Appeal from the United States District Court for the
Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE, REAVLEY, POL-
ITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY,
HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE,
Circuit Judges.¹

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Robert Sawyer was sentenced to death by a Louisiana
jury on September 19, 1980 for the brutal slaying of
Frances Arwood. Today we decide his appeal from the

¹ When this case was orally argued before and considered
by the court, Judge Rubin was in regular active service. He
participated in both the oral argument and the en banc confer-
ence, and with Judge King in the preparation of her dissenting
opinion. He took senior status, however, on July 1, 1989. Based
on his understanding of the Supreme Court decision in *United
States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 80 S.Ct.
1336, 4 L.Ed.2d 1491 (1960), he considers himself ineligible to
participate in the decision of this case, but he adheres to the
views in Judge King's dissent.

denial by a United States District Court of his petition for
writ of habeas corpus. We have elsewhere recorded the
long history of Sawyer's efforts to overturn his convic-
tion.² Sawyer's attack has now boiled down to three
arguments. First, he argues that his court-appointed trial
counsel was ineffective in certain respects. Second, and
closely related to the first, he argues that his conviction
should be set aside because his appointed counsel had
not been licensed for five years as required by La.Code
Crim.P. art. 512. Finally, he argues that the prosecutor in
closing argument misled the jury about its role in capital
sentencing as condemned by *Caldwell v. Mississippi*, 472
U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

A panel of this court rejected Sawyer's contentions,
dividing over the *Caldwell* issue, and we took the case *en
banc*. We reject Sawyer's first two contentions for the
reasons stated by the panel, affirm the district court's
denial of Sawyer's petition for relief from his conviction,
and turn to the difficult question of whether Sawyer is
entitled to a new sentencing hearing because the state
misled the jury about the jury's responsibility in deciding
whether Sawyer should be executed.

Part I summarizes the facts. In Part II we sketch the
constitutional principles that frame our inquiry. We next
in Part III address the statutory overlay to the constitu-
tional issues, as presented by the Supreme Court's recent
decision in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 103
L.Ed.2d 334 (1989). Because we conclude that we cannot
apply *Teague* without first defining the scope of *Caldwell*,

² *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).

we turn back in Part IV to the substantive constitutional questions. We endorse a version of Sawyer's construction of *Caldwell*. We find in Part V, however, that *Caldwell* so defined is a new rule within the meaning of *Teague*, and that *Caldwell* does not fit within either of *Teague*'s two exceptions. Sawyer's *Caldwell* argument is therefore *Teague*-barred. The prosecutorial argument complained of will thus vitiate Sawyer's death sentence only if Sawyer can prevail under the earlier rule of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In Part VI we conclude that Sawyer has no *Donnelly* claim. We therefore affirm denial of Sawyer's petition to vacate his sentence.

I

Caldwell addressed constitutional issues that arise when a prosecutor misleads a capital jury about its responsibility for the sentencing decision. The prosecutor's argument creates a possibility that the jury will decide between life and death without an appropriate sense of grave responsibility. Sawyer contends that *Caldwell* mandates a new sentencing trial any time a prosecutor taints the proceeding with a *Caldwell*-type argument, unless the argument had "no effect" upon the jury. Louisiana, however, says that a *Caldwell*-type prosecutorial argument will not generate constitutional grounds for reversal unless the argument rendered the sentencing phase "fundamentally unfair" to the defendant. Louisiana would have us focus upon effective prejudice to the defendant, rather than effective dilution of the jury's sense of responsibility. The case turns upon this disagreement.

Sawyer's *Caldwell* claim arises out of remarks which the prosecutor made in his closing argument during the trial's sentencing phase. The details of the prosecutorial remarks are important to Sawyer's argument. We therefore repeat those remarks here. The prosecutor told the jury,

The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision buy you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision [emphasis supplied].*

The prosecutor drew the jury's attention to the brutal nature of the crime for which Sawyer stood convicted. The prosecutor then returned to the theme of the jury's responsibility, saying

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your

hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

After arguing that a death penalty was justified in Sawyer's case, the prosecutor struck the theme of jury responsibility again, telling the jury that their mistakes could be corrected by later decision-makers:

It's all your³ doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions (emphasis supplied).

II

The problem of *Caldwell* error touches upon three of the Constitution's grandest themes. Two of these are obvious. The problem implicates federalism, because the

³ This word was likely recorded inaccurately by the stenographer. From context, it is clear that the prosecutor said, "It's all *you're* doing." The two phrases sound identical, but their meanings are nearly opposite.

state asserts a power to decide for itself questions of criminal procedure. *Caldwell* analysis also concerns individual rights, since the defendant contends that diminishing a capital jury's sense of responsibility subjects him to cruel and unusual punishment. The third theme is perhaps less obvious, but no less important to understanding the issues raised by a *Caldwell* claim. *Caldwell* touches the principle of popular self-government, because the direct expression of popular sentiment through juries remains an important aspect of the people's participation in the government, and a crucial check upon the state's authority to define the limits of crime and punishment.

The jury seems always to be at the center of the judicial struggle with the death penalty. This should not be surprising. Differences over the role of the jury reflect differences over the wisdom of the penalty itself. The legislative judgment specifying execution as the punishment appropriate to certain crimes embodies a confidence both about the moral principles of the community and about the capacity of the criminal justice system to resolve factual disputes. Coupled to the confidence must be an equal certitude that the jury will be able to bring the community's principles to bear, and so judge blame and guilt accurately in the individual case.

In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), Justice Harlan summarized how history had given expression to this deep link between the death penalty and the jury. Justice Harlan explained that legislatures "to meet the problem of jury nullification . . . did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion

which they had been exercising in fact." *Id.* at 199, 91 S.Ct. at 1463. Justice Harlan observed that the Court had earlier concluded that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary and community values and the penal system – a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." *Id.* at 202, 91 S.Ct. at 1464, *quoting Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 n. 15, 20 L.Ed.2d 776 (1968).

We have long recognized that decisions that depend essentially upon inarticulable judgment and common sense intuition are prime candidates for jury decision. Indeed, we refer to these judgments as "blackbox decisions." The sentencing decision in capital cases is born out of an inherent and unique mixture of anger, judgment and retribution, and requires a determination whether certain acts are so beyond the pale of community standards as to warrant the execution of their author. This decision to punish by death is a paradigmatic "black-box" call. To say that the decision can at best only be guided, not determined, by a judicial instruction or lawyers' argument underscores the decision's irreducible discretionary core.

A commitment to jury resolution of these blackbox decisions reflect a commitment to submit these issues to an active exercise of practical judgment, rather than to the reified precision of legal analysis. But the jury, of course, checks not only legalism but the government more generally. It protects from punishment those defendants who are innocent in the judgment of their peers.

For both these reasons, the right to trial by jury has long been cherished within our legal tradition. Blackstone commended juries as an "admirable criterion of truth, and most important guardian both of public and private liberty." W. Blackstone, 4 *Commentaries* 407. The Constitution expressly secures the right to jury trial. It is, then, neither coincidental nor surprising that the jury's integrity should be so aggressively protected in capital cases, when the stakes are so high.

Of course, the Court has since rejected *McGautha's* teaching that "[t]o identify before the fact those characteristics . . . in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204, 91 S.Ct. at 1466. The Court has demanded that states guide the jury's discretion. The Court has also permitted states to take some power away from the jury. But the jury's sense of gravity, and the responsible discretion it fosters, remain crucial to post *McGautha* sentencing schemes. *Caldwell* articulates a constitutional protection against state conduct that diminishes the jury's perception of its awesome responsibility.

In this sense, *Caldwell* itself is but the trace of a more comprehensive rule, one that might have trusted jury discretion to protect individual rights and express the scope of state power. The Court's post-*McGautha* jurisprudence has instead sought to secure individual rights by limiting jury discretion, and has deferred to the states' own restrictions upon jury power. The Constitution, after all, permits the people to speak through state law as well

as through juries. Federalism, no less than jury participation, ties local penalties to local sentiment and local judgment.

Nonetheless, it is necessary to perceive the larger theme in order to understand its trace within the composition that remains. *Caldwell* stands in part for the continuing vigor of the ideals articulated by Justice Harlan in *McGautha*. *Caldwell* treats jury discretion within a framework that recognizes both federal and state limits upon the jury's power. But it is the larger whole behind the trace which accounts for *Caldwell's* peculiar nexus to the constitutional mix of individual autonomy, federalism, and populism.

Indeed, this reflection of *McGautha's* ideals in *Caldwell* forms the lynchpin of Sawyer's argument here, and was the fulcrum for the argument that divided our panel. Only if *Caldwell* harkens back to the high esteem which *McGautha* accorded jury discretion can *Caldwell* impose, as Sayer would have it, considerably more stringent restrictions than its Due Process Clause precursor, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). *Donnelly* subjected prosecutorial argument to a generalized "fundamental fairness" standard, which would benefit Sawyer only were he able to show actual prejudice from the argument complained of. Sawyer's principal argument presupposes that the Eighth Amendment, as interpreted by *Caldwell*, puts a particular premium upon responsible jury discretion in a proceeding that fixes punishment at life or death. It is that premium which would, on Sawyer's argument, distinguish *Caldwell* from *Donnelly*. The existence of that premium in turn assumes that a jury's deliberation may be even more

crucial at the punishment phase than it is in choosing between guilt and innocence. That assumption makes sense only if, as Justice Harlan argued in *McGautha*, the jury's capacity to express moral sentiment directly is peculiarly essential to questions of capital blameworthiness.

Because Sawyer's claim comes before us by way of a habeas petition, not by direct appeal, we view the delicate constitutional mix through a similarly complex statutory overlay. The law of the habeas writ balances the vindication of constitutional rights against the state's constitutionally legitimate interest in maintaining a criminal justice system capable of producing final convictions. The Supreme Court refined anew this balance in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Teague's* rule precludes habeas petitioners from seeking to overturn their convictions on the basis of rules new by comparison with the date their convictions became final. This statutory balance provides, however, exceptions for constitutional claims of a certain character. It may therefore wrap back around the constitutional issues, and so, in Sawyer's case, back around the questions about jury responsibility in capital cases. Yet a plurality, at least, of the *Teague* Court regarded the *Teague* retroactively inquiry as a preemptive threshold to constitutional analysis. 109 S.Ct. at 1069. *Accord*, *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 2944, ___ L.Ed.2d ___ (1989) (applying *Teague* as threshold barrier to constitutional analysis). Because *Teague* may present a threshold barrier to fuller consideration of Sawyer's constitutional claims, we begin our analysis with that case.

III

The Supreme Court did not decide *Teague* until after the *en banc* court heard oral argument in this case. At our request the parties have filed briefs regarding *Teague*'s applicability to Sawyer's petition.

Teague adopts much of what Justice Harlan long advocated as the correct view of federal habeas. Under *Teague* a federal habeas petitioner attacking a final state conviction may rely only upon the law in effect when his conviction became final. There are two exceptions. First, the petitioner may rely upon a new rule if it would place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.*, 109 S.Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part)). The Court has since declared that this first exception also applies to rules which exempt certain persons entirely from capital punishment. *Penry*, 109 S.Ct. at 2955. Second, the petitioner may rely on a new rule requiring the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty'" *Teague*, 109 S.Ct. at 1073, quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (opinion of Harlan, J.) (inside quote from *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.)).

A majority of the *Teague* court fully subscribed to this restriction on the use of federal habeas to attack final state court convictions. *Teague* left much of the restriction's content in doubt, although some of that ambiguity was removed by the Court's later decision in *Penry v.*

Lynnaugh, 109 S.Ct. 2934, 2944 (opinion of O'Connor, J., for the Court). In *Teague* itself, four justices concluded, in an opinion by Justice O'Connor, that the second proviso, drawn from Cardozo's incorporation formulation, should be modified to limit its scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S.Ct. at 1076-77. The remaining justices filed four separate opinions: Justice White concurred separately, as did Justice Stevens; Justice Blackmun joined part of Justice Stevens's opinion, and added a brief writing of his own; and Justices Brennan and Marshall dissented.

Teague was not a capital case, and the plurality disclaimed any decision regarding its application to an effort by a state prisoner to overturn his death sentence. Justice Stevens joined Justice O'Connor's opinion insofar as it adopted Justice Harlan's restrictions on federal habeas. He dissented, however, from the plurality's insistence that "the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt'. . . ." *Id.* at 1081. He suggested that "a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings." *Id.* Justice Stevens noted that Justice Harlan's interest in making convictions final was "an interest that is wholly inapplicable to the capital sentencing context." *Id.* at 1081 n. 3. Justice O'Connor's plurality opinion replied that because *Teague* was not himself under a death sentence, the Court need not express any opinion "as to how the retroactivity approach we adopt today is to be applied in the capital sentencing

context. We do, however, disagree with Justice Stevens's suggestion. . . . As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 1077 n. 3.⁴

Note three did not gain majority support, since Justice White neither joined it nor otherwise mentioned *Teague's* application to death cases. Justice Brennan's dissenting opinion, joined by Justice Marshall, assumes that the plurality would apply the new limits to death cases, and observes that "the plurality's new rule apparently would not prevent capital defendants . . . from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus." *Id.* at 1089 n. 5.

The *Penry* decision settled *Teague's* application to death cases. In Part II-A of her opinion for a fractured Court, Justice O'Connor, joined by the Chief Justice and Justices White, Scalia, and Kennedy, held that *Teague* did apply to capital cases. The plurality simply observed that the finality concerns underlying the *Teague* doctrine hold equally well in capital cases, and offered no further analysis. The four remaining Justices dissented from the relevant portion of Justice O'Connor's opinion.

It remains unclear, however, whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits. 109 S.Ct. at

⁴ Justice Blackmun joined Justice Stevens's reservations about *Teague's* applicability to death cases.

1069-70, 1077. However, Justices Stevens and Blackmun, who joined the plurality to constitute a majority in favor of Justice Harlan's approach to retroactivity, expressly rejected the plurality's position on this matter. Justice Stevens, joined by Justice Blackmun, contended that the Court should proceed by "first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief." Justice Stevens went on to observe that, absent a precise formulation of the rule in question, it may be difficult to determine whether the rule is in fact "new" at all. *Id.* at 1079-80 & n. 2. Finally, Justice White once again declined to join the relevant portion of the plurality opinion, leaving unclear his own position on the relation between the constitutional and *Teague* issues.

On this point, *Penry* leaves the matter unclear. A majority did join a portion of Justice O'Connor's opinion which characterized *Teague* as a rule to be applied "as a threshold matter," 109 S.Ct. at 2944 (Part II-A). Indeed, in Part IV-A all nine Justices joined a portion of the opinion which included a reference to *Teague* as a threshold test. *Id.* at 2952. We must take care, however, not to overstate the significance of these votes. Thus, although Justice Stevens joined Part IV-A of Justice O'Connor's opinion, he reiterated in a separate concurrence his view that the constitutional rule should be articulated before *Teague* is applied. The threshold character of the *Teague* bar was not the primary topic of Part II-A or Part IV-A, and it would be unwise to assume that each Justice joining those parts intended that *Teague* function as a threshold barrier in every case where it applied.

More importantly, however, Justice O'Connor's own opinion mixed the *Teague* inquiry with the constitutional questions. In order to decide that Penry's requested rule was dictated by precedent, and so not new, she had to decide precisely the substantive question which divided the Justices five-to-four over Part III of her opinion: that is, the question of whether Penry's proposed rule was the best possible interpretation – let alone the interpretation "dictated by" – Supreme Court precedent. 109 S.Ct. at 2944-46 (Part II-B). Likewise, Justice Scalia, dissenting in part and joined by the Chief Justice, Justice White and Justice Kennedy, observed that "[t]he merits of the mitigation issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated." 109 S.Ct. at 2964.

The relationships that led to a mixing of the *Teague* issues and the constitutional issues in *Penry* become all the more powerful when a petitioner attempts not to establish a new rule, but to rely, as Sawyer would like to, upon a rule that is new by comparison to his own conviction yet is well established by the time of his habeas petition. In such a case, a court may have to reach the constitutional questions even to define what the petitioner complains of – in Sawyer's case, for example, "*Caldwell error*." Moreover, the court does not risk the awkward outcome of establishing a new rule in a case where it has no application. See *Teague*, 109 S.Ct. at 1077-78. The rule relied upon – for example, the rule governing *Caldwell error* – exists by the time the *Teague* issues arise in connection with a particular prisoner's petition.

Indeed, Sawyer's argument illustrates the difficulties that may arise from an attempt to separate *Teague* analysis from the substance of the constitutional claims raised. Whether *Caldwell* is a new rule, and whether *Caldwell* is a rule "implicit in the concept of ordered liberty" that implicates factual innocence, both depend in part upon what *Caldwell* means, and, more specifically, upon the relation between *Caldwell* and *Donnelly*. This dependence is made unmistakably clear by Louisiana's briefing of the *Teague* issue, which suggests that *Teague* is no bar to Sawyer's *Caldwell* claim precisely because Sawyer is wrong about the relation between *Caldwell* and *Donnelly*. If the Supreme Court had made clear that *Teague* necessarily bars an inquiry into the merits of the petitioner's constitutional claims, we would perhaps have to resolve the *Teague* issues by a conditional discussion of *Teague's* application to what Sawyer says *Caldwell* might mean. Such a conjectural analysis of possible rules would, however, entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy – which would be the ostensible goal of any version of *Teague* that preempted some constitutional inquiries.

We thus choose to address the merits of Sawyer's interpretation of *Caldwell* before applying *Teague* to *Caldwell*. We do not mean, however, by adopting this strategy to suggest that *Teague* never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question. We leave that issue for a case in which it

is properly presented, and turn to the merits of the constitutional arguments.

IV

At a general level, *Caldwell's* import is clear. Regardless of whether the Court moves toward or away from the *McGautha* acceptance of juror discretion, the sentencing jury must continue to feel the weight of responsibility so long as it has responsibility. Lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role. For the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function. It is not surprising then that jury arguments calculated to have that effect have long been condemned by numerous jurisdictions. See *Caldwell*, 105 S.Ct. at 2642 nn. 4 & 5. See also Mello, *Taking Caldwell v. Mississippi Seriously*, 30 B.C.L.Rev. 283, 305-308 & nn. 100-114 (1989). The decision of the Court in *Caldwell* reflects this reality, insight born more of experience than of empirical study or abstract exposition.

In no way is the importance of *Caldwell* error diminished by the possibility that a state may dispense with the jury's sentencing power in capital cases. See *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The evil of *Caldwell*-type prosecutorial arguments is not that they divest juries of their responsibility, but rather that they distort the jury's understanding of a power which it in fact retains. The decision-maker empowered to choose between life and death must not be relieved of

the gravity attending that choice. Whether a judge or jury decides the sentence, the responsibility to decide must remain adjoined to the power to decide. It would, of course, be less likely that a prosecutor could mislead a judge, whose own knowledge of the law should overcome any misleading argument. But a judge who misunderstands the sentencing decision in a capital case creates a Constitutional defect no less significant than a jury which misunderstands its decision. Cf. *Hickerson v. Maggio*, 691 F.2d 792, 794-95 (5th Cir.1982).

The argument between Sawyer and Louisiana does not draw into question these general observations. Sawyer contends that *Caldwell*, recognizing the unique role of the jury in capital sentencing, imposes an especially stringent procedural safeguard by requiring that the defendant receive a new sentencing hearing if the prosecutor's argument had any effect on the jury's perception of its own responsibility. Louisiana concedes the impropriety of prosecutorial argument that misleads the jury as to its role, but contends that the sentencing phase is marred by a constitutional defect only if the prosecutorial argument rendered it "fundamentally unfair." According to Louisiana, *Caldwell* did not establish a "no effect" test for constitutional error, but simply applied *Donnelly's* "fundamental fairness" test to the facts of a sentencing hearing. On this argument, *Caldwell* extends *Donnelly* to punishment proceedings without altering *Donnelly's* rule by any reaffirmation of *McGautha's* reflections upon jury responsibility.

It is this argument which brought the case before the *en banc* court. To resolve it, we must consider *Caldwell* in some detail. We begin with the facts.

Caldwell killed the owner of a grocery store in the course of a robbery. His lawyers' plea for mercy at the sentencing phase of his capital murder trial rested on his poverty, troubled youth, and character evidence. His lawyers argued

[E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death – the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know – an awesome responsibility.

Caldwell, 105 S.Ct. at 2637. The argument triggered the following exchanges:

"ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

"COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

"THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

"ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so."

Id. at 2637-38. A divided Mississippi Supreme Court affirmed and the Supreme Court granted certiorari. Speaking for the Court, Justice Marshall concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 105 S.Ct. at 2639. He explained that the court's post-*Furman* review of state procedures "has taken as a given that capital sentencers would view their task as the

serious one of determining whether a specific human being should die at the hands of the State." *Id.* at 2640. He then found "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.*

The State proposed three reasons why the prosecutor's argument should not upset the death sentence. The State argued that under *California v. Ramos*, 463 U.S. 992, 1001-06, 103 S.Ct. 3446, 3453-56, 77 L.Ed.2d 1171 (1983), it was free to instruct juries in capital cases about appellate processes. In part IV(a) of the *Caldwell* opinion, joined only by Justice Brennan, Justice Blackmun and Justice Stevens, Justice Marshall rejected this argument. He concluded that, unlike in *Ramos*, the argument in *Caldwell* was not relevant to a valid state penological interest and was misleading. In the *Caldwell* plurality's view, appellate review was simply not relevant to the juror's task of determining an appropriate sentence. For that reason, the prosecutor's argument that the jurors should view themselves as only taking a preliminary step in the sentencing determination served no valid state interest. Justice O'Connor's concurring opinion agreed, but refused to read *Ramos* "to imply that the giving of *nonmisleading* and *accurate* information regarding the jury's role . . . is irrelevant to the sentencing decision." *Id.*, 105 S.Ct. at 2646 (O'Connor, J., concurring; emphasis in original). In her view the prosecutor's argument was impermissible because it misled "in a manner that diminished the jury's sense of responsibility." *Id.*

The Court next rejected the state's contention that the prosecutor's argument was a reasonable response to defense counsel's argument. The Court observed that the prosecutor's reference to appellate review did not respond to defense counsel's suggestion that sentence of life would be without parole, nor to the defense's religious theme and plea for mercy.

Finally, and most importantly for our purposes, the Court rejected the State's contention that in any event the effect of the prosecutor's argument should be measured by the standard of *Donnelly v. DeChristoforo*, which would judge improper prosecutorial arguments to vitiate a sentencing proceeding only if they rendered the proceedings fundamentally unfair. The Court distinguished *Donnelly* on two grounds. First, the Court pointed out that in *Donnelly* the trial court gave a strong curative instruction to the jury, while in *Caldwell* the judge not only gave no correcting instruction but "stated to the jury that the remarks were proper." *Id.*, 105 S.Ct. at 2645. Second, in *Donnelly* the remarks were ambiguous and not focused pointedly upon " 'the principal concern' of our jurisprudence concerning the death penalty, the 'procedure by which the State imposes the death sentence.' " *Id.* (quoting *California v. Ramos*, 463 U.S. at 999, 103 S.Ct. at 3452).

Justice Rehnquist, joined by Justice White, dissented, contending that when the argument was placed in its full trial setting it "fell far short of telling the jury that it would not be responsible for imposing the death penalty." 105 S.Ct. at 2649 (Rehnquist, J., dissenting). Rather, "the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence." *Id.* at 2650 (emphasis in original). He observed that under

Ramos there was nothing wrong with telling a jury that its decision is subject to appellate review, and that the prosecutor did not mislead the jury by suggesting that its decision would be subject to de novo review.

The division between the *Caldwell* majority and the dissenting Justices, like the division between Sawyer's argument and Louisiana's argument, turns in significant part upon the fate of *Donnelly's* "fundamental fairness" formula in capital sentencing proceedings. As we shall see, the effect upon a death sentence of *Caldwell* error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of *Caldwell* error. Much of the argument here is over the ingredients of the prohibition.

Sawyer, as we have said, argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*. Sawyer argues that the prosecutor's argument at the sentencing phase of his trial misled the jury regarding its role. In particular, he contends that the argument unambiguously told the jury that its role was only to recommend punishment and that others would check their decision, an argument even more pointed than in *Caldwell*. Sawyer maintains that such an argument effectively renders a proceeding fundamentally unfair by definition, and that the standard of *Donnelly* is therefore inapplicable because superfluous. It follows, he argues, that he is

entitled to a new sentencing hearing before a jury properly aware of its responsibility. According to Sawyer, neither a contemporaneous objection nor participation by the trial judge are prerequisites to a *Caldwell* claim. *Caldwell* mandates a new sentencing hearing so long as the court reviewing *Caldwell* error "cannot say that [the prosecutor's statements] had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 328-329, 105 S.Ct. 2639-2640. Sawyer says that in *Kirkpatrick v. Blackburn*, 777 F.2d 272, 289-90 (5th Cir.1985), this court declared that "the no effect test applies to the state's effort to minimize the jury's sense of responsibility, not to every other improper argument." He maintains that the Supreme Court in *Darden v. Wainwright* adopted this court's position holding *Caldwell* applicable in any case where the prosecutor "mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144 (1986).

As already mentioned, Louisiana contends, in essence, that *Caldwell* merely applies *Donnelly* to a case where the combination of prosecutorial and judicial action at a sensitive moment rendered the proceedings especially unfair to the defendant. Louisiana argues that no new sentencing hearing should be ordered unless we find both that there was *Caldwell* error and that it rendered the trial fundamentally unfair. Pointing to *Darden v. Wainwright*, the State argues that Sawyer must show prosecutorial misconduct that "so infected the trial as to deny

due process." See *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly v. DeChristoforo*). Louisiana argues that the due process standard is applicable because the prosecutor's argument, when stripped of non-misleading statements, was not as clear and focused as in *Caldwell*. Louisiana stresses the absence both of any objection by defense counsel and of any signal from the trial judge that might have endorsed the prosecutorial misstatement.

We agree with Sawyer that *Caldwell* must be read in light of *McGautha*. The state cannot resist a conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. See, e.g., *Coleman v. Brown*, 802 F.2d 1227, 1238-41 (10th Cir.1986), cert. denied, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987); see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1460-61 (9th Cir.1987), cert. denied, ___ U.S. ___, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir.1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987); *Mann v. Dugger*, 844 F.2d 1446, 1457-58 (11th Cir.1988) (en banc). Cf. *Hopkinson v. Shillinger*, 866 F.2d 1185, 1226-33 (10th Cir.1989); *id.* at 1233-38 (Logan, J., dissenting). Once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case" – and the Supreme Court has told us precisely that, see *Darden*, 106 S.Ct. at 2473 n. 15, – it is apparent that, as Sawyer contends, the *Donnelly* issue

of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error.

If the state has misled the jury in the manner condemned by *Caldwell*, it can be no answer that the culprit was the prosecutor and not the judge. With either source, the error is the same. Although in *Caldwell* there was an objection and a potent affirmation of the misleading argument by the trial judge, the relevance of these events was to the question of whether the jury was actually misled. In other words, the absence of objection and trial judge participation are highly relevant to the question of whether a jury was misled, but their absence is not determinative as a matter of law of the question of whether the state misled the jury. We do not read the Court's opinion in *Darden* to the contrary.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). In short, a prosecutor's statements to the jury accurately describing its role will not support a *Caldwell* claim. At the same time, a statement can be literally true but quite misleading by failing, for example, to disclose information essential to make what was said not misleading. Indeed much of our law of fraud under the Securities Act rests on just such a reality. See 17 C.F.R. 240.10b-5(b).

It is suggested that, in spite of these considerations, a willingness to find *Caldwell* error from unobjected to argument by a prosecutor unwisely creates an incentive for defense counsel to not object. After all, an objection may

lead to a curative instruction and any appellate point is not lost by remaining silent. The questionable validity of the assumed incentives aside, these concerns as well as the other values that lie behind our usual insistence that error be preserved are not unique to *Caldwell* error. The essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection. More to the point, the decision to entertain claimed constitutional error without a contemporaneous objection belongs in the first instance to the state, when as here, we review a state court conviction. A state may insist upon a contemporaneous objection. And, ordinarily, a federal habeas court is bound by that decision and cannot reach claims of error found by the state to have been waived. *Dugger v. Adams*, 109 S.Ct. at 1215. In short, whether to insist upon a contemporaneous objection as a matter of orderliness, as distinguished from the question of whether an objection is an element of the constitutional claim itself, is a matter for the state court.

It is suggested that even if the *Caldwell* issue must be addressed because the state reached its merits, a contemporaneous objection is an element of a *Caldwell* claim. We have concluded that a timely objection is an essential element of a claim of racial discrimination in the exercise of preemptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Jones v. Butler*, 864 F.2d 348, 369 (5th Cir.1988) (on petition for rehearing). But the constitutional rule in *Batson* rests on a change in the requirement of proof from that of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (insisting upon proof of a pattern of discrimination by

prosecutors in cases) to the case specific procedures of *Batson*. *Teague*, 109 S.Ct. at 1066. *Batson* assures an objecting defendant that a prosecutor striking black veniremen will articulate non-racial reasons for its decisions. An objection is plainly central to a *Batson* claim. *Caldwell*, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* In *Caldwell*, unlike in *Batson*, the constitutional defect – if it exists – is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

In sum, we reject Louisiana's proffered definition of *Caldwell*. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation.

Continuing our definition of *Caldwell* error, we turn to the question of what an appellate court looks to in gauging the state's conduct, and quickly find that the nature of the prohibition takes us a long way toward the answer. What has been communicated to the jury by the state cannot be disentangled from the total trial scene,

and thus that is our terrain. While the prosecutor's argument will often be the natural point of departure, we must turn to the opposing argument and then to instructions of the court, both in its formal charge and in any rulings on objections. The initial focus will be upon the close of the sentencing hearing, yet inquiry may proceed not only to the guilt phase but to jury selection as well. In short, a trial cannot be cabined into distinct segments. As the Supreme Court phrased it: "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

While this is inevitably a case-by-case inquiry with a broad terrain to be surveyed, there are a number of events that obviously may loom large and quickly focus the inquiry. First, the trial judge is an extraordinarily (sic) puissant figure. A direct and uncorrected misstatement to the jury that misleads the jury regarding its role will be difficult to salvage. For example, *Caldwell* error was found by the Eleventh Circuit when a trial judge told the jury that he was the ultimate determinant of whether the defendant was sentenced to death. The Circuit reached this conclusion even though the jury's role under Florida law is advisory. *Adams v. Wainwright*, 804 F.2d 1526, 1532-33 (1986), *modified on denial of rehearing*, 816 F.2d

1493 (1987), *rev'd on other grounds*, *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Second, the absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript. Third, the argument may take on a different hue when read as a reply to opposing counsel. Fourth, the court may have mitigated the effect of counsel's argument by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence. Fifth, veniremen often receive extensive instruction during voir dire. These instructions, as well as the questions and advices of counsel, are also relevant. Finally, through the course of trial the judge may give detailed instructions to the jury about its role. Such familiar instructions are part of the message to the jury and all must be considered. We list these lines of inquiry to explain the scope of inquiry that may be required in review of asserted *Caldwell* error, without suggesting that the list is exhaustive. By definition, it is not and cannot be. Indeed, in some cases the presence or absence of error will be readily determinable solely on the basis of the prosecutor's argument and the trial judge's treatment of it.

V

A

Sawyer's conviction was final at least by 1984 when the Supreme Court denied his petition for certiorari. See *Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Because Sawyer wishes to rely on the Court's later decision in *Caldwell*, he must grapple with the limitation of *Teague*. Sawyer first argues that *Teague*

does not bar his argument because *Caldwell* did not announce a new rule, so that the prosecutor's argument was constitutionally infirm measured by the law in place in 1984 when his conviction became final.

The Supreme Court's decision in *Penry*, left the definition of a "new rule" in some doubt. Justice O'Connor reiterated her statement, first presented in *Teague* that a case "announces a new rule when it breaks new ground or imposes a new obligation on the State or the Federal Government, [or,] to put it differently . . . if the result was not dictated by precedent." *Penry*, 109 S.Ct. at 2944 (quoting *Teague*, 109 S.Ct. at 1070 (plurality opinion)). Yet Justice O'Connor's application of this standard led Justice Scalia, joined by three colleagues, to contend that the Court had only given "lip-service" to the *Teague* standard. *Penry*, 109 S.Ct. at 2964 (opinion of Scalia, J., dissenting; Part II). Justice Scalia said that "it challenges the imagination to think that today's result is 'dictated' by our prior cases." *Id.* at 2965. He went on to say that "[i]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling," and went so far as to remark that "[it] is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term." *Id.* at 2965.

Justice Scalia's comments are especially significant because he speaks on behalf of all three Justices who joined Justice O'Connor's plurality opinion in *Teague*, and on behalf of Justice White as well. Yet, Justice Brennan, in his separate *Penry* opinion, apparently does not agree with Justice Scalia that *Teague* has been gutted. Justice

Brennan reiterates his contention, first made in his dissent from *Teague* itself, that the *Teague* rule is an "unprecedented curtailment of the reach of the Great Writ," and accuses the majority of compounding its errors by extending *Teague* to death cases.

Indeed, Justice O'Connor's application in *Penry* of *Teague*'s "new rule" formula may well have turned upon facts which she thought unique to *Penry*'s claims. In Justice O'Connor's view, *Penry* sought only to compel Texas "to fulfill the assurance upon which [*Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at 2945. *Penry*'s claim rested on the clearly established and specific Constitutional rule that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the offense that mitigates against imposing the death penalty." Justice O'Connor concluded that the path from *Jurek* to *Penry* involved the consistent application of an established constitutional rule to, in essence, changes in the facts.

Because of these disagreements about the meaning of the *Teague* test, the Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a "new rule." We must interpret what Justice O'Connor has said by reference to the purposes served by the *Teague*

rule. To undertake that inquiry, we first turn to the complex of concerns now accommodated within federal habeas jurisprudence.

A federal court's role in a habeas attack on a state court conviction is only to review for errors of constitutional magnitude. The Constitution commands us to defer to federalism, and so recognizes that the solemn judgment of a state's highest court enjoys a presumption of validity, which may be overcome only for failure to abide the Constitution itself. The role that remains for federal courts is by no means modest. To the contrary, viewed over the full span of history, it is rather an extraordinary reach for superintending power. Indeed, the first legislation empowering federal courts to issue a writ for state custody did not come until the Habeas Act of 1867. Until the Court's decision in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original proceeding. . . ."⁵ Seen in this light, casting our role as that of a constitutional backstop is hardly a retrenchment, and *Teague's* reach for finality is modest indeed.

Teague, whether applied to a capital sentence or to a more ordinary case, is by no means a return to the law that preceded *Brown v. Allen*, if indeed it is a turn in that direction at all. *Teague* rather reflects a distinct and basic judgment that, putting aside the cases falling within its

two provisos, there is no fundamental unfairness inherent in refusing to wield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final. Due regard for the constitutional structure of federalism, and the protection it accords to state government, counsels the opposite – that only preservation of constitutional principles justifies the intrusion.

The *Teague* judgment about the federal role acknowledges that neither finality nor federalism will condone constitutional acquiescence in the conviction of persons factually innocent of the crime charged. Our efforts to reduce the risk of convicting an innocent person are evidenced by myriad procedural safeguards and by high requirements of proof. These restrictions reflect a commitment to accurate outcomes so firm that we consciously increase the chance of acquitting guilty persons to reduce the chance of convicting the innocent. It is not surprising, then, that the Supreme Court is fairly unanimous in its view that a state court prisoner can rely upon a fundamental constitutional rule implicating factual innocence even though that rule was not announced until after his conviction became final.

It might nonetheless be contended that the Court's "factual innocence" proviso is not enough to vindicate the rights of prisoners, and that capital cases show particularly well various considerations that compel a narrow formulation of *Teague's* "new rule" element. One reasoning along these lines might point to the inherent finality of the death penalty, and contend that the benefit of every

⁵ See *Mackey v. United States*, 401 U.S. 667, 684, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring).

announced constitutional rule should be given to a prisoner facing this extreme penalty. One might likewise argue that in habeas petitions challenging a death sentence but not the underlying conviction, the state need not fear that it will have to relitigate issues of innocence and guilt on the basis of stale evidence, and so run the risk of freeing a criminal who would have been convicted by a fair and timely trial. Finally, continuing to reason against finality interests on the basis of concerns unique to death cases, one might argue that in such cases there is no danger that the state's efforts at rehabilitation will lose their focus because of the habeas process; that habeas petitioners succeed more frequently in capital cases than in other cases; and that other factors, external to the habeas system, are responsible for delays in the execution of state prisoners.

Yet unless we suppose a perfectly stable constitutional jurisprudence, it is unclear how finality could ever be achieved if these arguments are accepted at full reach. As the Court made clear in *Penry*, the order of magnitude of punishment is not relevant to *Teague's* support of finality so long as we except rules implicating factual innocence. The "death is different" argument in this context is little more than an argument against the validity of the punishment itself. As an argument directed to the purposes of *Teague* – the matter now before us – it fails.

Of course, the penalty is different from all others in many respects. We recognize that it is the extreme of punishments when we reserve the punishment for the most extreme of crimes, as we do under our present law. Death sentences, which by their nature aim at retribution

or deterrence and not at rehabilitation, obviously do implicate different state purposes than do terms of incarceration. But that the interests are different does not imply that they are less deserving of federal deference, or that comity concerns are any less important. A state policy predicated upon the certainty of exact retribution, no less than a state policy predicated upon incarceration in a facility designed in part to rehabilitate, suffers when the prospect of punishment is confused by a series of collateral federal attacks.

Indeed, much that is unique about the law controlling death cases is in fact a powerful testament to the need for the finality-serving rules of *Teague*. The constitutionally secured rules announced for death cases by the Supreme Court since *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), have come in such number and with such rapidity that the entire jurisprudence is fairly described as being in a state of flux. During the ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can with little dissent, be described as presenting issue of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases. In the 1986 term alone, the Supreme Court acted on eighty requests for stay of execution. This undermines the argument that *Teague* has no application to death cases.

Nor is there anything inhumane in an insistence that a death-sentenced state prisoner confine his attack upon that sentence to the rules in effect when his conviction

became final. So long as nothing new implicates the petitioner's factual innocence, we, confronted with the need for sureness of punishment as contrasted with the never ending uncertainty and serendipitous state of a nigh open set of rules, see little to persuade us that respect for human dignity counsels against application of finality rules.

In light of the powerful reasons that justify the *Teague* doctrine, we see no cause to limit its application to the rare or extraordinary case. When a rule is indeed *dictated* by precedent – a word Justice O'Connor took care to emphasize in *Penry* as she did in *Teague* – then a state can reasonably be asked to anticipate its articulation, and enforcing the rule in the habeas proceeding will not intrude upon the state's legitimate interest in the finality of convictions. Otherwise, however, *Teague* must bar the rule's application. We do not, despite Justice Scalia's strong words in dissent, read *Penry* to the contrary. Instead, we believe that Justice O'Connor regarded *Penry* as a special case, one simply reapplying the rule of *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to a unique development in state law. See *Penry*, 109 S.Ct. at 2945 (Opinion of O'Connor, J., Part II-B, discussing *Jurek*). Justice O'Connor honored the language of the *Teague* opinion, and we must assume she intended to honor its spirit as well.

B

Sawyer correctly observes that many state courts, including Louisiana, had before *Caldwell* developed common law rules forbidding misleading jury argument

about the importance of the jury's decision. See e.g., *Pait v. State*, 112 So.2d 380, 383-84 (Fla.1959); *Blackwell v. State*, 76 Fla. 124, 79 So. 731, 731, 735-736 (1918); *Wiley v. State*, 449 So.2d 756, 760 (Miss.1984); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425, 427-29 (1979); *State v. Gilbert*, 273 S.C. 690, 258 S.E.3d 890, 894 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977); *People v. Morse*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 211-212, 388 P.2d 33, 43-44 (1964); *State v. Mount*, 30 N.J. 195, 152 A.2d 343, 351-52 (1959); *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465, 467 (1940). For example, the Louisiana Supreme Court ordered a new sentencing hearing in a 1982 capital case when, without objection, the prosecutor argued to the jury that the "buck" started with them and did not end there, and that "everything" will more than likely be reviewed by every appeals court in the United States. *State v. Willie*, 410 So.2d 1019, 1034-35 (La. 1982). But it does not necessarily follow from the circumstance that Louisiana law forbade the argument made by Sawyer's prosecutor when it was made, that the Supreme Court did not announce a "new" rule in *Caldwell*.

Sawyer's argument fails to deal with *Teague's* explicit offer of *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), as an example of a decision that created a "new rule." *Ford* held that the Eighth Amendment prohibits states from inflicting the penalty of death on an insane prisoner. Execution of the insane was prohibited at common law. Indeed, the *Ford* Court observed that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . ." 477 U.S. at 406, 106 S.Ct. at 2600. Moreover, twenty-six states of the fourth-one with a death penalty had "statutes

explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408, n. 2, 106 S.Ct. at 2601, n. 2. Sawyer's reliance upon *Caldwell's* common law roots and its relationship to the rules of several states, including Louisiana, cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*.

There was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional footing. *Caldwell* was certainly new in its conclusion that such arguments violated the Eighth Amendment. See *Mello*, 30 B.C.L. Rev. at 305. Of course, when Sawyer's conviction became final, *Donnelly* would have authorized federal jurisdiction over a habeas petition attacking the sentence on due process grounds. Yet, as we have seen, Sawyer persuasively contends that *Caldwell* was more than a straightforward application of *Donnelly* to new facts. Our question is then whether these changes suffice to make *Caldwell* a new rule within the meaning of *Teague*.

The *Teague* court held that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 109 S.Ct. at 1070 (emphasis in original). Accord, *Penry*, 109 S.Ct. at 2944. We have little difficulty in concluding that so measured, *Caldwell's* greatly heightened intolerance of misleading jury argument is a new rule within the meaning of *Teague*. Its direct impact upon the finality of state convictions is illustrated by this case.

Sawyer, however, nonetheless contends that this heightened standard for review of prosecutorial argument does not create a new rule. He has two arguments. First, Sawyer says that Louisiana not only condemned *Caldwell*-type prosecutorial argument, but did so under an Eighth Amendment standard identical to the *Caldwell* standard. For this proposition, Sawyer cites a string of Louisiana cases explaining that Louisiana's death penalty procedures were designed to comply with the Supreme Court's Eighth Amendment decisions, see, e.g., *State v. Payton*, 361 So.2d 866, 870-73 (La.1978), *State v. Sonnier*, 379 So.2d 1336, 1370 (La.1980), and *State v. Willie*, 410 So.2d 1019, 1032-33 (La.1982), and another string of Louisiana cases condemning *Caldwell*-type prosecutorial arguments, see, e.g., *State v. Berry*, 391 So.2d 406, 418 (La.1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981); *Willie*, 410 So.2d at 1034-35, and *State v. Robinson*, 421 So.2d 229, 231-34 (La.1982).

Yet it is one thing to say that a state, inspired by earlier constitutional decisions, had anticipated *Caldwell* as a matter of state law, and a very different matter to say that the state had recognized a *Caldwell*-type rule as a constitutional restriction its own power. In an effort to bring the Louisiana cases within the latter category, Sawyer relies heavily on the Louisiana Supreme Court's recent post-*Caldwell* decision in *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988). There, the Louisiana Court said it need not consider a *Caldwell* claim on collateral attack after rejecting a similar state law challenge on direct review, for *Caldwell* "did not change our previous case law." Again, however, this statement and the other remarks in *Busby* indicate only that the state law and

Caldwell rules are coincident. The remarks do not show that Louisiana law condemned *Caldwell* argument because it regarded such argument as an Eighth Amendment violation. We therefore need not decide whether, if a rule is "new" as a matter of constitutional interpretation but not "new" in state interpretations of the federal Constitution, it is nonetheless "new" for purposes of the *Teague* bar upon collateral federal challenges to state convictions.

Sawyer next contends that this Circuit in *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986), has already decided that *Caldwell* is not a new rule. In *Moore*, we held that even if the *Caldwell* standard were separable from the Louisiana state standard for assessing prosecutorial argument, petitioner Moore should have anticipated in an earlier habeas petition the possibility of a distinct constitutional standard. We therefore held that Moore's *Caldwell* argument was not "new" for purposes of the writ abuse doctrine, and stated that the doctrine would bar the argument. Sawyer's attempt to rely on *Moore* must fail, for the meaning of "newness" differs in writ abuse cases from its meaning in *Teague* cases. In writ abuse cases, the key question is whether a particular argument is being made by attorneys: the argument is not "new" if it is being made, and so should be known to attorneys. The Supreme Court makes clear, however that a rule is new for purposes of *Teague* if it has not been accepted at the time the petitioner's conviction became final. *Teague*, 109 S.Ct. at 1070. *Moore* thus cannot bear the freight Sawyer would put on it.

C

The *Teague* test allows two exceptions. Sawyer, however, cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution. He contends only that the state's sentencing procedure was unconstitutionally administered. *Teague's* first exception, dealing with substantive limitations upon the criminal law-making authority, therefore does not apply.

We turn, then, to the plurality's insistence in *Teague* that a new rule may be relied upon by a habeas petitioner if it both "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" and "procedures without which the likelihood of an accurate conviction is seriously diminished." Sawyer contends that we should not in his case apply the "accurate conviction" qualification to Harlan's proviso. First, Sawyer argues that the qualification is only a plurality view. The *Penry* opinions did not discuss the "fundamental to ordered liberty" proviso, or the "actual innocence" qualification to it. However, Justice White's joinder in Justice Scalia's dissent, and in Part II-A of Justice O'Connor's opinion (which references the *Teague* plurality's formulation of the exceptions), strongly suggests that Justice White has adopted the position of the *Teague* plurality. In any event, our short answer is that pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can.

Second, Sawyer argues that confining use of new rules to those implicating factual innocence has not relevance to a jury's decision to impose a death and not a life sentence. We are not persuaded. A habeas petitioner may not escape this imitation use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence. Rather, such a petitioner must show that the new rule insists on procedures without which the correctness of the jury's decision to punish by death rather than by life imprisonment is seriously diminished.

We thus accept the plurality's formulation of the provision, and turn to its application. Our task is made difficult by the newness of the amalgam of the second proviso as well as its uncertain precedential footing. Justice O'Connor's opinion for the plurality insisted that it is "unlikely that many such components of basic due process have yet to emerge." 109 S.Ct. at 1077. Justice O'Connor went on to say that these components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus – that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods" (citations omitted). The new rule contended for in *Teague* was an extension to petit juries of the fair cross section requirement of a jury venire. The plurality opinion concluded that such a new rule "would not be a 'bedrock procedural element' that would be retroactively applied under the second exception. . . ." *Id.* at 1077.

While the Court has made plain that it expects to encounter few newly discovered bedrock procedural

rules, it is not clear how *Caldwell*, with its condemnation of a particular type of jury argument, fits into the *Teague* scheme. This difficulty stems in part from uncertainty about *Teague's* standard for sorting the bedrock from the host of other rules calculated to enhance the efficiency and fairness of a trial. We can immediately put aside rules that only enhance as distinguished from rules essential to fundamental fairness. This first cut is informed by developed principles of incorporation doctrine that leave the states free of all but the core assurances, variously expressed as rejecting "tail with the hide" and "jot-for-jot" incorporation. See e.g., *Duncan v. Louisiana*, 391 U.S. 145, 181, 88 S.Ct. 1444, 1465, 20 L.Ed.2d 491 (1968) (Harlan, J., dissenting). For example, the Fourteenth Amendment requires Louisiana to provide Sawyer a jury and a fundamentally fair trial. Louisiana has wide latitude in its choice of procedures for doing so and few procedures are so essential as to be required by the Fourteenth Amendment. This distinction is reflected in our willingness to find errors to be harmless and our refusal to grant relief absent a demonstration not only that the rule was violated but also that its violation rendered a trial fundamentally unfair.

Caldwell manifestly implicates two principles that would be fundamental in the sense required by *Teague's* second proviso. The first is *Donnelly's* restriction requiring that a proceeding not be "fundamentally unfair" to the defendant. The second is the more expansive regard for jury discretion suggested by *McGautha*, a regard trimmed back, as we have mentioned, by the Court's later interpretations of the Eighth Amendment. Were Sawyer seeking to rely on either of these principles as new rules,

his argument would be compelling. Yet *Donnelly's* principle is not new by comparison to Sawyer's conviction, and McGautha's general themes do not constitute a rule at all. What Sawyer seeks to rely upon is *Caldwell's* modification of *Donnelly* in light of the ideals discussed in *McGautha*. That modification is not itself so fundamental as to be "implicit in the concept of ordered liberty." After all, the only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial "fundamentally unfair."

A recent decision of the Supreme Court supplies additional guidance for our inquiry. In *Dugger v. Adams*, the Court decided whether Florida's procedural default rule barred Adams's *Caldwell* claim. To resolve that issue, the Court had to determine whether a "fundamental miscarriage of justice" would result if the procedural default rule were permitted to defeat Adams's *Caldwell* claim. The Court held that no such miscarriage of justice would arise.

In reaching its conclusion, the *Adams* Court wrote as follows:

The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." . . . According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," . . . the standard for showing a fundamental miscarriage of justice is necessarily satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of

error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," . . . into an all too ordinary one.

109 S.Ct. at 1217-18 & n. 6.

Adams, of course, does not directly control *Teague's* application to a *Caldwell* claim. *Adams* applies a "fundamental miscarriage of justice" standard to determine whether a *Caldwell* claim might fit within an exception to the procedural default rule. *Teague* applies an "implicit in the concept of ordered liberty" and "implicating factual innocence" standard to determine whether a *Caldwell* claim might fit within an exception to the doctrine barring habeas petitioners from relying on new rules. The verbal formulae are different, and their application thus might differ, too. Moreover, the *Adams* miscarriage standard requires scrutiny of the facts of a particular case, while the *Teague* ordered liberty standard looks to the character of the general rule asserted.

Nonetheless, we must take care not to exaggerate the substantive import of these semantic differences. Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final.

Indeed, in some respects *Teague* functions as a radical extension of the procedural default rule by forcing defendants to establish a new rule on direct appeal rather than on collateral attack, if they wish to rely on such a rule. Because of the similarities between the two doctrines, it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the "new rule" doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Adams is also important for another reason: given the particular facts of *Adams*'s own case, the Court's disposition of the case presupposes a judgment about the importance of *Caldwell* error to a sentencing determination. In *Adams*, as the Court noted, the trial judge "found an equal number of aggravating and mitigating circumstances." The court made clear that there was no fundamental miscarriage of justice even though *Caldwell* error goes to the accuracy of the sentencing procedure, and even though the case was a close one. In short, the mere possibility of a close case did not make the alleged error's threat to accuracy sufficiently fundamental to warrant exemption from the procedural bar.

Sawyer's *Caldwell* claim runs into comparable problems when analyzed in light of the second *Teague* proviso. Sawyer can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet, as we have already stated, the Court's *Teague* opinion makes quite clear that not every procedural rule affecting the accuracy of a trial will fit within the "ordered liberty" proviso. To hold otherwise would be to cling to "jot-for-jot" or "tail-with-the-hide" incorporation, and to make

the "extraordinary case into the ordinary one." Instead, the examples listed by the *Teague* Court – trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture – either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's *Caldwell* claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second *Teague* proviso.

Our extended exposition of the nature of *Caldwell* error reinforces the inferences we drew from the Supreme Court's decision in *Adams*. *Caldwell* error does indeed implicate core aspects of the sentencing procedure. As such, it implicates both the integrity of that procedure and the accuracy of the determination in any particular case. Yet to say that accuracy is implicated is not to say that the defendant is necessarily prejudiced. In fact, *Caldwell*'s deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding. It is, of course, unusual to presume the existence of reversible error, on the basis of the prosecutor's comments, absent any showing of prejudice. This presumption is an important one, and, we would hope, will contribute to the increased integrity and accuracy of

criminal procedure in this sensitive area. But none of this makes *Caldwell* so fundamental, or so connected with factual innocence, as to fit within *Teague's* second proviso.

VI

Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we, after a thorough review of the record, can find none.

We have covered considerable ground about the content of the *Caldwell* rule. Yet, the dissent falls silent on this set of issues, perhaps because the posture of the case does not require that we apply *Caldwell*. It is then only on narrow, but crucial grounds, that our opinion is engaged, and to assist its focus we conclude with one observation in reply to the dissenting view.

Judicial tradition demands that new rules find their trace in older ones. This search is near the core of discipline that distinguishes judges from other decision makers. Judges excel at the task. Such artisans possess a very important tool – a gauge of generality. It is no surprise then that *Teague's* effort to limit federal habeas by asking whether a rule is new invites those who resist the restriction to reach for their tool kit. At a sufficient level of abstraction there are no new rules. The judicial artisan can start by asserting that the old rule is that a trial must be fundamentally fair, that a defendant is entitled to procedural due process. Stated this generally there have been few if any new rules for the trial of criminal cases.

This dissent does precisely this, resting its assertions on little more than that the old rule is the prohibition of unfair jury argument. Its old law is unnarrowed by any definition of its reach and force such as whether it treats such state conduct as inherently destructive of required fairness or insists on demonstrated prejudice in a given case. Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without *Caldwell*. Nonetheless, we are told that *Caldwell* was indicated by precedent, that it broke no new ground and that it imposed no new obligation on the states. We are asked to believe that *Caldwell* simply applied well established constitutional principles. If to the uninitiated this is dissemblance, unhappily it is to the cognoscenti business as usual. By adroit use of the generality gauge our able dissenting colleagues can breathe superficial credibility into the fable that *Caldwell* broke no new ground, imposed no new obligation on the states and was dictated by precedent. With all deference, there is afoot here no more than a resistance to the principles of finality adopted by *Teague*. We should not play such sophisticated games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created. We are persuaded that little or nothing is left of *Teague's* promise if the dissent's view is accepted. We think that this artisan's destruction of so recent a decision by the Supreme Court should be rejected and we do so. Ultimately only *Teague's* authors can tell us if they meant what they said or if they have changed their minds.

For these reasons, we find that *Teague* bars Sawyer from pursuing his *Caldwell* claim. We affirm the district

court's decision denying Sawyer's petition for a writ of habeas corpus.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

Sawyer has been found guilty of capital murder. He does not contest his guilt. The only issue before the en banc court is whether he is entitled to have a properly instructed jury determine that he should be executed by the State or spend the rest of his life in jail, without the benefit of probation or parole.¹ Whatever we decide, he will not be set free.

The majority has rejected the interpretation of *Caldwell v. Mississippi*² on which the state relied in urging that we deny Sawyer's petition for habeas relief. The majority concludes, however, that the State may execute Sawyer, regardless of the merits of his *Caldwell* claim, because *Caldwell* established a "new rule" in constitutional law and, under the Supreme Court's recent decision in *Teague v. Lane*,³ Sawyer may not receive the benefit of its application because his conviction became final before *Caldwell* was decided.

If, as the majority admits, "it is not clear how *Caldwell* . . . fits into the *Teague* scheme" because of the "newness of the amalgam" of standards *Teague* set on "uncertain precedential footing," we do not see why it is

¹ See La.Rev.Stat. Ann. 14:30(C) (1980).

² 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

³ ___ U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

incumbent on us to condemn Sawyer to die instead of ordering the State to put the life-or-death issue to a jury that is not only not misled but is fully informed of its responsibilities. In contrast to the majority's ambivalence, we harbor no doubt that Sawyer is entitled to the constitutional protections guaranteed by the eight amendment: *Caldwell* did not establish a "new rule," and even if it did, *Teague* requires its retroactive application. We, therefore, respectfully dissent.

I.

Although the majority opinion contains a lengthy exegesis on the role of the jury and the nature of *Caldwell* error, it does not reach the merits of Sawyer's claim. We would find that on the facts of Sawyer's case, his sentence is invalid under *Caldwell*. The prosecutor, in describing the jury's role, remarked:

the law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type*

of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).

the prosecutor went on to describe the brutal nature of the crime and, briefly its impact on the victim and her mother. then, once again turning to the function of the jury, the prosecutor stated:

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you*

do have the courage of your convictions (emphasis supplied).

The prosecutor's arguments in Sawyer's case fall squarely within *Caldwell's* prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility in capital sentencing. The trial court did not correct these statements, and because we cannot say that these comments had no effect on the jury's decision, we would vacate Sawyer's sentence and grant him a new sentencing hearing.⁴

II

Whether Sawyer may receive the benefit of the constitutional protection enunciated in *Caldwell* depends, however, on the threshold determination that *Caldwell* established a "new rule." Conceding that "[i]t is . . . often difficult to determine when a case announces a new rule," the plurality in *Teague* nevertheless offered the following explanation: "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new Rule if the result is not *dictated* by precedent existing at the time the defendant's conviction became final."⁵

The plurality recognized that constitutional rules will fall along a "spectrum" – from those that fit neatly within

⁴ See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

⁵ *Id.* ___ U.S. at ___, 109 S.Ct. at 1070 (O'Connor, J., plurality opinion) (emphasis in original) (citations omitted).

the rubric of settled law to those that constitute a clear break from prior precedent – but provided little additional guidance for determining at *which* point a rule is not “dictated” by precedent and, therefore, “new” for retroactivity purposes.⁶

In *Penry v. Lynaugh*,⁷ however, the Court began to elaborate the meaning of the term “new rule.” The Court held that although it had previously found the Texas sentencing scheme facially valid,⁸ the scheme, as applied to Penry, unconstitutionally limited the jury’s ability to consider certain, relevant mitigating evidence.⁹ The Court held that this determination did not constitute a “new rule” given the requirement that capital sentencing procedures permit the sentencing jury to consider and give effect to all relevant mitigating evidence.¹⁰

The Court reasoned that a rule is not “new” for purposes of retroactivity analysis when it “fulfill[s] the assurance” upon which a previous case “was based” or merely “interpret[s] broadly” that previous case.¹¹ The Court thus made clear that its “dictated by precedent” language was not intended to categorize as “new” every rule that does not fit precisely within the pattern of a

⁶ See *ibid.*

⁷ ___ U.S. ___, 109 S.Ct. 2934, ___ L.Ed.2d ___ (1989).

⁸ See *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

⁹ *Penry*, ___ U.S. at ___, 109 S.Ct. at 2951.

¹⁰ *Id.* at ___, 109 S.Ct. at 2943-47; see *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

¹¹ *Penry*, ___ U.S. at ___, 109 S.Ct. at 2945.

previously decided case. Rather, the Court recognized that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not “new.” To define “new” rules more broadly would depart significantly from the traditional understanding of constitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.¹²

This differentiation between elaborating and applying established principles, on the one hand, and announcing new rules that are dissonant with prior understandings of the law, on the other hand, derives directly from Justice Harlan’s view of retroactivity that the Court adopted in *Teague* and applied in *Penry*. Justice Harlan observed “that many, though not all, of this Court’s constitutional decisions are grounded upon fundamental principles . . . whose meanings are altered slowly and subtly as generation succeeds generation.”¹³

¹² See *Yates v. Aiken*, 484 U.S. 211, ___, 108 S.Ct. 534, 538, 98 L.Ed.2d 546 (1988); *Truesdale v. Aiken*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987); *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 714, 93 L.Ed.2d 649 (1987); *Allen v. Hardy*, 478 U.S. 255, 258 106 S.Ct. 2878, 2880, 92 L.Ed.2d 199 (1986); *Shea v. Louisiana*, 470 U.S. 51, 57, 105 S.Ct. 1065, 1068, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 549-50, 102 S.Ct. 2579, 2586-87, 73 L.Ed.2d 202 (1982); *Solem v. Stuims*, 465 U.S. 638, 662, 104 S.Ct. 1338, 1352, 79 L.Ed.2d 579 (1984) (Stevens, J., Dissenting); see also Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U.Chi.L.R. 719, 749-54 (1966).

¹³ *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting).

He reasoned that such rules are not "new" and should be given retroactive application in habeas proceedings because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final."¹⁴

Caldwell held that a prosecutor may not "le[a]d" a jury to "believe" that it is not "responsib[le] for determining the appropriateness of [a] defendant's death."¹⁵ The Court based this rule upon its belief that such prosecutorial misconduct "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability' " in capital sentencing, and that such conduct, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment"¹⁶ Arguments that seek to diminish the jury's sense of responsibility, the Court explained, undermine core eighth amendment values:

The "delegation" of sentencing responsibility that the prosecutor here encouraged . . . would deprive [the defendant] of . . . [the] right to a fair determination of the appropriateness of his death . . . , for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination,

¹⁴ *Id.* at 264, 89 S.Ct. at 1041.

¹⁵ *Caldwell*, 472 U.S. at 329, 105 S.Ct. at 2639.

¹⁶ *Id.* at 340, 105 S.Ct. at 2645 (footnote omitted) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, J., plurality opinion)); See *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "(those) compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁷

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence. The *Caldwell* Court fulfilled the assurance enunciated in *Furman v. Georgia*¹⁸ and *Gregg v. Georgia*¹⁹ that capital punishment not be administered "wantonly" or "freakishly" or in an "arbitrary and capricious manner;"²⁰ it applied the "need for reliability in the determination that death is the appropriate punishment in a specific case," assured in *Woodson v. North Carolina*,²¹ *Lockett v. Ohio*,²² and *Eddings v. Oklahoma*,²³ to a situation in which that reliability was compromised; it fulfilled the promise of *Woodson*, *Lockett*,

¹⁷ *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640 (quoting *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

¹⁸ 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

¹⁹ 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

²⁰ *Gregg*, 428 U.S. at 188, 96 S.Ct. at 2932 (Stewart, J., plurality opinion) (citing *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763 (Stewart, J., concurring)).

²¹ 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1978) (Stewart J., plurality opinion).

²² 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 571 L.Ed.2d 973 (1978) (Burger, C.J., plurality opinion).

²³ 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982).

and *Eddings* that a defendant be sentenced to death only after an individualized determination of his moral culpability;²⁴ and it applied the need first articulated in *McGautha v. California*²⁵ that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human"²⁶ to a case in which the prosecutor specifically instructed the jury that it had no such responsibility. With due respect to the three dissenters in *Caldwell*, it is difficult to imagine the Court reaching any other conclusion given these precedents.

There was, moreover, no precedent inconsistent or dissonant with *Caldwell* at the time it was decided. While the Court, in *Donnelly v. DeChristoforo*,²⁷ had imposed a more stringent due-process test for claims of improper argument made at the guilt/innocence phase of trial, this analysis applied neither to improper argument at sentencing proceedings nor to argument implicating "specific guarantees of the Bill of Rights."²⁸ The *Donnelly* Court thus left open the possibility that improper arguments at sentencing not violative of the Due Process Clause may be held to contravene the eighth amendment's requirements.

²⁴ See *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion); *Lockett*, 438 U.S. at 601-05, 98 S.Ct. at 2963-65 (Burger, C.J., plurality opinion); *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; see also *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969, ___ L.Ed.2d ___ (1989) (O'Connor, J., concurring); *South Carolina v. Gathers*, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

²⁵ 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

²⁶ *Id.* at 208, 91 S.Ct. at 1467.

²⁷ 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

²⁸ *Id.* at 643, 94 S.Ct. at 1871.

Similarly, in *California v. Ramos*,²⁹ the Court posited its approval of jury instructions containing information regarding postconviction procedures on the fact that the information was both relevant and accurate.³⁰ While the Court in *Ramos* did not address whether a prosecutor violates the Constitution by presenting irrelevant and misleading information concerning post-conviction proceedings, its emphasis on the nature of the instruction forecast that such information would be found to undermine the reliability of the sentencing process by injecting into it an arbitrary factor in violation of the eighth amendment.³¹

If, as the Court in *Penry* instructed, we should consider a case "dictated by precedent" and not "new" for retroactivity purposes when it "fulfill[s] the assurance[s]" of or "interpret[s] broadly" principles articulated in a previous case,³² it is difficult to see how the majority may conclude that *Caldwell* announced a "new rule." *Caldwell* fulfilled the assurance of and interpreted faithfully the settled principle in eighth amendment jurisprudence that a verdict of death must rest upon the reliable determination of a jury accurately informed of its "awesome responsibility;" the same line of eighth amendment cases that compelled the result in *Penry* thus compelled the result in *Caldwell*.

²⁹ 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

³⁰ *Id.* at 1004, 1009, 1012, 103 S.Ct. at 3455, 3457, 3459.

³¹ See *Caldwell*, 472 U.S. at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ramos*, 463 U.S. at 999, 1010, 103 S.Ct. at 3451, 3458).

³² *Penry*, ___ U.S. at ___, 109 S.Ct. at 2944.

The majority contends that the foregoing analysis unduly restricts the scope of *Teague*. Its criticism of our interpretive method is misdirected, however, for the majority's dispute is not, in reality, with *our* interpretation of *Teague*, but with *Penry's* elaboration of the "new rule" standard set forth in *Teague*. Indeed, the majority's criticism of our analysis echoes precisely Justice Scalia's dissent in *Penry*.³³ In admonishing us to wait for "*Teague's* authors [to] . . . tell us if they meant what they said," the majority ignores the fact that *Teague's* authors have already spoken in *Penry* and have effectively rejected any definition of a "new rule" that would sweep broadly enough to encompass *Caldwell*.

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than *Penry's* for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*. Indeed, the Court in *Caldwell* observed that after *Furman*, several state supreme courts – including Louisiana's – had anticipated *Caldwell* and found that *Caldwell*-type errors undermined the validity of a death sentence;³⁴ it noted that some state courts had prohibited such arguments in both capital and noncapital cases even before *Furman*.³⁵

³³ *Id.* at ___, 109 S.Ct. at 2963.

³⁴ *Caldwell*, 472 U.S. at 333-34 & n. 4, 105 S.Ct. at 2642 & n. 4 (citing cases).

³⁵ *Id.* at 334 & n. 5, 105 S.Ct. at 2642 & n. 5 (citing cases).

At least five years before the Supreme Court decided *Caldwell*, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor into the jury's decision and invalidated the sentence. In 1980, when denying an application for rehearing in *State v. Berry*,³⁶ the Louisiana Supreme Court recognized

[a]ny prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, . . . then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated. . . . The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.³⁷

In 1982, in *State v. Willie*,³⁸ the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing when the prosecutor referred to appellate review and told the jury that "the buck really don't [sic]

³⁶ 391 So.2d 406 (La.1980) (denial of application for rehearing), *cert. denied*, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

³⁷ *Berry*, 391 So.2d at 418 (emphasis in original) (portions of text omitted); see *id.* at 419-21 (Calogero, J., dissenting from denial of rehearing); *State ex rel. Williams v. Blackburn*, 396 So.2d 1249, 1250 (La.1981) (Dennis, J., dissenting from denial of stay); *id.* at 1250 (Calogero, J., concurring in denial of the stay); *State v. Monroe*, 397 So.2d 1258, 1270 (La.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1411 (1983).

³⁸ 410 So.2d 1019 (La.1982), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 723 (1984).

stop with you. The buck starts with you. . . . [W]hat I'm asking you to do is start the buck rolling."³⁹ The court quoted *Berry*, and added:

This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence of death is appropriate is not entirely the jury's responsibility.⁴⁰

In *State v. Robinson*,⁴¹ also in 1982, the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing because the prosecutor referred repeatedly to the jury's sentence as a "recommendation" that did not have a "strong possibility" of "get[ting] through all of that [appellate] review."⁴² Citing *Berry* and *Willie*, the court anticipated the "no effect" test required by the eighth amendment, stating:

The closing argument requires that the death sentence be set aside, because this court cannot

³⁹ *Id.* at 1034.

⁴⁰ *Id.* at 1035, see *State v. Clark*, 492 So.2d 862, 870-71 (La.1986).

⁴¹ 421 So.2d 229 (La.1982).

⁴² *Id.* at 231-33.

determine that misleading and improper remarks of this magnitude did not influence the jury's recommendation. . . . [W]e cannot say that the jury's sentencing discretion was unaffected by the prosecutor's repeated and often misleading references to the largely irrelevant consideration of appellate review of death sentences.⁴³

As the Louisiana Supreme Court observed, *Caldwell* neither imposed a new obligation on prosecutors or courts nor broke new ground in Louisiana.⁴⁴ Before the Supreme Court decided *Caldwell*, Louisiana had already prohibited *Caldwell* argument and required reversal of sentences when it found such error. Moreover, in finding that *Caldwell* argument injected an arbitrary factor into the sentencing process, the Louisiana courts relied on the same eighth amendment principles that compelled the Supreme Court's decision in *Caldwell*. In *State v. Sonnier*,⁴⁵ the Louisiana Supreme Court stated that under Louisiana law, the court "is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor."⁴⁶ The court described how Louisiana modelled its provision for independent appellate review of death sentences on the Georgia procedure sanctioned in *Gregg v. Georgia*, and cited approvingly the Georgia Supreme Court's reversal of a death sentence when it found that "an unobjected to argument by a [prosecutor]

⁴³ *Id.* at 233-34 (portions of text omitted).

⁴⁴ See *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La.1988).

⁴⁵ 379 So.2d 1336 (La.1979).

⁴⁶ *Id.* at 1371.

may have influenced the jury to impose a more severe sentence than unbiased judgment would have given."⁴⁷ In *Willie*, the court again adverted to *Gregg*'s requirement that a sentencer's discretion be channelled to avoid arbitrary and capricious imposition of the death penalty, and held that the prosecutor's improper argument regarding appellate review "lessened" the jurors' appreciation of their "awesome responsibility" and "created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors."⁴⁸ Echoing *McGautha*, the Louisiana Supreme Court thus anticipated almost exactly Justice O'Connor's conclusion in *Caldwell* that such arguments "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' . . . or through 'whim . . . or mistake.' "⁴⁹

The majority concedes that numerous states, including Louisiana, forecast *Caldwell* by prohibiting the arguments that the *Caldwell* Court ultimately barred, but concludes that because states' *Caldwell* precursors did not impose an independent constitutional constraint on state power, they are irrelevant to *Teague*'s analysis. That the state courts adopted these rules before *Caldwell* to conform state law to perceived eighth amendment requirements, rather than conforming to an independent federal

⁴⁷ *Id.* at 1370-71 & n. 4.

⁴⁸ *Willie*, 410 So.2d at 1032, 1034.

⁴⁹ *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451, and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

constitutional constraint articulated by the Supreme Court, is a distinction without a difference for the purpose of determining whether *Caldwell* announced a "new rule." In either case, the state courts based their interpretations on the eighth amendment, and their widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

In *Dugger v. Adams*,⁵⁰ the Supreme Court found these state laws sufficiently established to conclude that the legal basis for raising a *Caldwell*-type claim prior to *Caldwell* was "reasonably available to counsel," and that *Caldwell* was, therefore, of such vintage as to be subject to the procedural-bar rule.⁵¹ In *Moore v. Blackburn*,⁵² we considered a writ application based on *Caldwell* barred by the abuse-of-writ doctrine for the same reason. If both the Supreme Court and this court have considered, on the basis of state laws anticipating *Caldwell*, a *Caldwell*-type claim sufficiently established to negate cause for failing to raise it years before *Caldwell*, how may we now ignore these state laws and conclude that *Caldwell* is novel?

Contrary to the majority's assertion, the *Teague* plurality's citation of *Ford v. Wainwright*⁵³ as an example of a

⁵⁰ ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

⁵¹ *Id.* at ___, 109 S.Ct. at 1215-17.

⁵² 774 F.2d 97 (5th Cir.1985), cert. denied, 476 U.S. 1176, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986).

⁵³ 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

"new rule" does not establish that state rules are irrelevant to determining whether a rule is "new."⁵⁴ In *Ford*, the Court looked to state law for "objective evidence of contemporary values"⁵⁵ and noted that 26 states had enacted statutes prohibiting the execution of insane persons while other states adhered to the common law principle prohibiting such executions.⁵⁶ Although the *Teague* plurality did not explain *why Ford* should be considered a "new rule," the Court's discussion in *Penry* suggests that any substantive eighth amendment rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or because of the nature of their offense" will be "new" because of its sweeping and categorical nature,⁵⁷ even though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn such punishment.⁵⁸ The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

⁵⁴ See *Teague*, ___ U.S. at ___, 109 S.Ct. at 1070.

⁵⁵ *Ford*, 477 U.S. at 406, 106 S.Ct. at 2600.

⁵⁶ *Id.* at 408-09 & n. 2, 106 S.Ct. at 2601 & n. 2.

⁵⁷ *Penry*, ___ U.S. at ___, 109 S.Ct. at 2951 (citations omitted). Such a rule would, however, necessarily fall within the first exception to *Teague* and would be applied retroactively. See *ibid.*

⁵⁸ *Ibid.*; see *Stanford v. Kentucky*, ___ U.S. ___, ___, 109 S.Ct. 2969, 2975, ___ L.Ed.2d ___, ___ (1989); *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2687, 2691, 101 L.Ed.2d 702 (1988); *Enmund v. Florida*, 458 U.S. 782, 788-96, 102 S.Ct. 3368, 3371-76, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 2866-68, 53 L.Ed.2d 982 (1977).

The *Teague* plurality's citation of *Ford* cannot, therefore, be construed as a broad holding regarding the proper role of state law in determining whether a rule is "new." At most, *Teague*'s citation of *Ford* indicates that the existence of state common law and statutes embodying principles later incorporated into eighth amendment law does not preclude a finding that the rule is nevertheless "new." It does not command us to ignore state law and, in particular, it does not indicate that state court interpretations of the federal Constitution are irrelevant to determining whether a rule is "new" under *Teague*.

Indeed, the majority's refusal to address the import of a state's interpretation of the federal Constitution misconstrues the basis of *Teague*'s retroactivity principles. The plurality opinion in *Teague* anchored its retroactivity analysis, the majority recognizes, in the principles of federalism and finality; it sought to mitigate the uncertain effect of new and unanticipated obligations on final state court judgments.⁵⁹ The majority ignores, however, a basic precept of federalism that animated the *Teague* plurality: state courts, no less than federal courts, may meaningfully interpret the federal Constitution. "It is intolerable," Justice Harlan asserted, "that [the Supreme Court] take to [itself] the sole ability to speak to . . . issues of federal constitutional law;" the decision of an "inferior" court, "cognizant of the Federal Constitution and duty bound to apply it," should not be deemed "forever erroneous because years later th[e] Supreme Court took a different view of the relevant constitutional

⁵⁹ *Teague*, ___ U.S. at ___, 109 S.Ct. at 1070-75 (O'Connor J., plurality opinion).

command."⁶⁰ The majority's failure to acknowledge and give effect to Louisiana's prohibition of *Caldwell*-type error prior to *Caldwell* minimizes the role of state courts in our federal constitutional framework and devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms.⁶¹

Sawyer did not raise his *Caldwell* claim on direct review, and, on collateral review, the Louisiana courts summarily rejected the argument on its merits. Although our conclusion on the merits of Sawyer's claim differs from that reached by the Louisiana courts on collateral review, we rely on the same constitutional principles that the state courts considered, not on some "new" constitutional rule unanticipated by the Louisiana Supreme Court. An advocate of even the narrowest view of the appropriate role of collateral review could not maintain that principles of federalism and finality preclude habeas relief whenever a federal court, applying the same constitutional principles as the state court, reaches a different conclusion on the merits of a petitioner's claim. This minimal "backstop" function of collateral review to which the majority refers remained untouched by *Teague*.

We are aware that the Court's decision in *Penry* implies that the "new rule" analysis is properly focused on one state when the proposed rule is directed at the procedure of a particular state, but may be broader when the

⁶⁰ *Mackey v. United States*, 401 U.S. 667, 680, 689-90, 91 S.Ct. 1160, 1174, 1178, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in the judgment).

⁶¹ See Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

proposed rule would apply to all states.⁶² We therefore, do not suggest that Louisiana's anticipation of *Caldwell* is dispositive⁶³ of whether *Caldwell* was a new rule, for *Caldwell* error is not restricted to Louisiana's sentencing procedure. At a minimum, however, the adoption of *Caldwell*-type rules by numerous states, including Louisiana, prior to *Caldwell* reveals the degree to which the Court's eighth amendment jurisprudence compelled the result reached in *Caldwell*.

III.

Even if *Caldwell* announced a new rule, it nevertheless should be applied to cases on collateral review because it falls within the exception provided by *Teague* for new rules requiring the observance of "those procedures that . . . 'are implicit in the concept of ordered liberty,' " that "implicate the fundamental fairness of the trial," and "without which the likelihood of an accurate conviction is seriously diminished."⁶⁴

The plurality in *Teague* diverged from Justice Harlan's approach to retroactivity by adding an "accuracy"

⁶² See *Penry*, ___ U.S. at ___ - ___, 109 S.Ct. at 2943-47, 2951.

⁶³ See *Teague*, 109 S.Ct. at 1070 (citing *Ford*, 477 U.S. at 410, 106 S.Ct. at 2602).

⁶⁴ *Teague*, ___ U.S. at ___, 109 S.Ct. at 1075-77 (O'Connor, J., plurality opinion) (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (Harlan, J., concurring in the judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937))).

qualification to the "fundamental fairness" exception, implying that only those rules touching on factual innocence would fall within it.⁶⁵ While Justice Harlan had subscribed to this view in his dissent in *Desist*,⁶⁶ he subsequently rejected it in *Mackey*, acknowledging that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."⁶⁷ The majority admits that the *Teague* plurality's modification of Justice Harlan's second exception does not command a majority of the Court, and although a solid majority of the Court employed *Teague*'s retroactivity analysis in *Penry*, *Penry* did not address the *Teague* plurality's gloss of the fundamental fairness exception.⁶⁸

The Court's unanimous recognition in *Penry* that *Teague*'s first exception encompasses a distinct eighth amendment component⁶⁹ suggests that the Court would find a parallel component in *Teague*'s second exception, and exempt from *Teague*'s nonretroactivity rule those capital sentencing procedures that ensure the "accuracy" of the sentencer's determination. The plurality in *Teague* acknowledged that "a criminal judgment necessarily includes the sentence imposed."⁷⁰ Both the plurality and

⁶⁵ See *Teague*, ___ U.S. at ___, 109 S.Ct. at 1080 (Stevens, J., concurring in part and concurring in the judgment).

⁶⁶ See *Desist*, 394 U.S. at 262, 89 S.Ct. at 1041 (Harlan, J., dissenting).

⁶⁷ *Mackey*, 401 U.S. at 694, 91 S.Ct. at 1181 (Harlan, J., concurring in the judgment).

⁶⁸ See *Penry*, ___ U.S. at ___, 109 S.Ct. at 2943, 2953.

⁶⁹ *Ibid.*

⁷⁰ *Teague*, ___ U.S. at ___ n. 3, 109 S.Ct. at 1077 n. 3 (O'Connor, J., plurality opinion).

dissent in *Teague* would, therefore, agree that *Teague*'s exemption of new rules that ensure the accuracy of the determination of the defendant's guilt or innocence includes new rules that ensure the accuracy of the sentencer's determination that a particular defendant deserves the death penalty.⁷¹

The rule *Caldwell* announced, based on the "heightened 'need for reliability' " in capital sentencing,⁷² satisfies *Teague*'s second exception: *Caldwell* error undermines the eighth amendment's requirement that responsible jurors produce individualized, reliable verdicts, and thus seriously diminishes the likelihood of an accurate sentence. As Justice O'Connor emphasized in her concurrence in *Caldwell*: "[T]he prosecutor's misleading emphasis on appellate review misinformed the jury, . . . creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously' . . . or through 'whim or mistake.' "⁷³ For the majority to ignore the effect of *Caldwell* error on the reliability and accuracy of the sentence seriously

⁷¹ See *ibid*; *id.* at ___ n. 5, 109 S.Ct. at 1089 n. 5 (Brennan, J., dissenting); cf. *Adams*, ___ U.S. at ___, 109 S.Ct. at 1217-18 n. 6; *id.* at ___ n. 4, 109 S.Ct. at 1219 n. 4 (Blackmun, J., dissenting); *Ramos*, 463 U.S. at 1007-09, 103 S.Ct. at 3457.

⁷² *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645 (quoting *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

⁷³ *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451 and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

misapprehends the nature of a *Caldwell* violation and the reasons behind the Court's decision to prohibit it.

To justify its conclusion that *Caldwell* does not satisfy *Teague*'s second exception, the majority relies primarily on *Dugger v. Adams*,⁷⁴ in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice."⁷⁵ Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*[-]ordered liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Whether or not the principles underlying the procedural default and retroactivity doctrines are similar, there is a substantial difference between denying a *particular petitioner* the benefit of a rule based on the unique facts of his case, and holding that *no petitioner*, whatever his situation, may benefit from retroactive application of the rule to his case. The Court recognized this distinction in *Adams*, stating that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received."⁷⁶ Under *Teague*, we must address the nature of *Caldwell* error, not the specific facts of *Sawyer*'s case.

⁷⁴ ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

⁷⁵ *Id.* at ___ n. 6, 109 S.Ct. at 1217-18 n. 6.

⁷⁶ *Ibid.*

The majority conflates the individual and the categorical in order to obscure the ultimate import of its holding – that the eighth amendment values *Caldwell* articulated constitute an unwarranted innovation in eighth amendment jurisprudence and are insignificant in the pantheon of values present in criminal procedure. *Caldwell* is worthy of higher esteem, for the Supreme Court found *Caldwell* error so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state demonstrated otherwise.⁷⁷ Not all errors in the capital sentencing context are so critical. For example, a death sentence based on an aggravating factor invalid under state law, but supported by evidence properly before the sentencer, does not sufficiently implicate the accuracy of the sentencing process to warrant a presumption of prejudice.⁷⁸ Prejudice is assumed, however, when the sentencer has not been allowed to consider or give effect to relevant mitigating evidence,⁷⁹ when an aggravating factor is premised on incorrect or invalid evidence,⁸⁰ or when the jury's sense of responsibility has been undermined.⁸¹

⁷⁷ *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

⁷⁸ See *Barclay v. Florida*, 463 U.S. 939, 956-57, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens*, 462 U.S. 862, 887-88, 103 S.Ct. 2733, 2748, 77 L.Ed.2d 235 (1983).

⁷⁹ See *Hitchcock v. Dugger*, 481 U.S. 393, 397, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

⁸⁰ See *Johnson v. Mississippi*, 486 U.S. ___, ___, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988).

⁸¹ See *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

IV.

The majority acknowledges that the death penalty "is different from all other [punishments] in many respects." Yet, by denying that *Caldwell* interpreted and applied consistently the Court's eighth amendment jurisprudence to new facts, and by refusing to accord the heightened need for reliability in capital sentencing a role in *Teague*'s fundamental fairness exception, the majority eviscerates the procedural protections on which the constitutionality of this ultimate and irreversible penalty is premised. The majority has, in effect, given finality concerns greatest force in the area where the eighth amendment requires that we be most wary. We cannot agree that a state's interest in the finality of a judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, exception of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule,⁸² to prevent us from applying *Caldwell*, which is at most an extension of settled doctrine. If any case should be considered as having established a new rule not retroactively applicable to habeas

petitioners whose convictions have become final it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme court 16 months after submission of Sawyer's case and 8½ years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

⁸² See *Teague*, ___ U.S. at ___ nn. 3 & 4 109 S.Ct. at 1086 nn. 3 & 4 (Brennan, J., dissenting); compare *id.* at ___, 109 S.Ct. at 1060-78 (O'Connor, J., plurality opinion) with *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Desist*, 394 U.S. 244, 89 S.Ct. 1030; *Mackey*, 401 U.S. 667, 91 S.Ct. 1160; *Solem*, 465 U.S. 638, 104 S.Ct. 1338.

Supreme Court of the United States

No. 89-5809

Robert Sawyer,
Petitioner

v.

Larry Smith, Interim Warden

ON PETITION FOR WRIT OF CERTIORARI to the United
States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted.

January 16, 1990

No. 89-5809

Supreme Court, U.S.
FILED

MAR 6 1990

JOSEPH E. CARNIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether the decision in *Caldwell v. Mississippi*, condemning false and misleading prosecutorial arguments to a capital jury concerning the jurors' sentencing responsibility, should be applied retroactively:

(A) because *Caldwell* did not create a "new rule" under the standards of *Teague v. Lane* and *Penry v. Lynaugh*, or

(B) because *Caldwell* vindicates rights of fundamental fairness that enjoy a special exemption from the non-retroactivity rule of *Teague v. Lane*?

II. Whether petitioner Sawyer is entitled to a new sentencing hearing on the ground that his Eighth Amendment rights were violated when the prosecutor made false and misleading arguments to his capital jury concerning the jurors' sentencing responsibility?

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BRIEF FOR PETITIONER
CITATION TO OPINIONS BELOW

The En Banc opinion of the Court of Appeals for the Fifth Circuit is reported at 881 F.2d 1273 (5th Cir. 1989), and is reproduced in the Joint Appendix (J.A.) at 214-289. The opinion of the panel that was vacated in part by the En Banc Court is reported at 848 F.2d 582 (5th Cir. 1988), and is reproduced at J.A. 154-211.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana (Mentz, J.) has not been reported. The District Court adopted, with modifications, the Magistrate's Findings and Recommendations, which are not reported. Both the District Court opinion and the Magistrate's opinion are reproduced at J.A. 94-153.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

**CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED**

This case involves the Eighth Amendment, which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment, which provides in relevant part:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Louisiana statutes, which are reprinted in Appendix A:

Louisiana Code of Criminal Procedure, Article 905.6

Louisiana Code of Criminal Procedure, Article 905.7

Louisiana Code of Criminal Procedure, Article 905.8

Louisiana Code of Criminal Procedure, Article 905.9

Louisiana Supreme Court Rule 28

STATEMENT OF THE CASE

Robert Sawyer was represented at his first degree murder trial by an attorney who was unqualified under Louisiana statutory law to defend death penalty cases, and who received \$1,000 for his work. Before trial, Robert Sawyer was offered a plea bargain that would have allowed him to plead guilty to murder and to receive a mandatory life sentence, but he declined the plea. His co-defendant, Charles Lane, was prosecuted for first degree murder in a separate trial, and received a life sentence from his sentencing jury. The prosecutor in Charles Lane's case then prosecuted Robert Sawyer, and sought the death penalty. J.A. 12, 155-158.¹

At the guilt phase of Robert Sawyer's trial, the prosecutor made a closing argument and defense counsel then stood silent, waiving his closing. After the jury returned a guilty verdict on the capital charge, a sentencing hearing was convened, and the presentation of witnesses lasted a little over an hour. The prosecutor then gave his closing argument, going first. The complete text of the closing arguments at the sentencing hear-

¹ Robert Sawyer lived with his girlfriend, Cynthia Shano, and her two children. Her friend, Frances Arwood, stayed with the children one night while Robert, Cynthia and Charles Lane went out drinking together. Robert and Charles Lane returned to the house at 7:00 a.m. and were both sleep-deprived and drunk from an excessive amount of alcohol. They went out of control when Robert discovered evidence that Ms. Arwood had given drugs to the children. Robert's girlfriend testified against both Charles Lane and Robert concerning the beatings and other injuries Ms. Arwood received from the men. Ms. Arwood later died. *State v. Sawyer*, 422 So.2d 95, 97-98 (La. 1982). Robert Sawyer's sister testified that Robert himself was an abused child, who received extremely harsh and brutal treatment from his father after his mother committed suicide. He was kept isolated from others, was subjected to harsh labor on his father's farm, and often was whipped and beaten. He was committed to a state mental institution after running away from home. *Id.* at 100.

ing appears at J.A. 6-13. The prosecutor's arguments included the following statements:

[Following a discussion about the statutory death penalty factors that the prosecutor was presenting to the jury for its consideration:]

That will be a question of fact for the jury to decide. *The law provides that if you find one of these aggravating circumstances then what you are doing as a jury, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation* [J.A. 7 (emphasis added).]

[Following an argument about how the defendant is to blame for his own situation:]

There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and the impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.* [J.A. 8-9 (emphasis added).]

[Following a discussion about how the evidence relates to the statutory factors required for the death penalty:]

. . . I think you will decide that there are at least three or four aggravating circumstances which you could reasonably impose in order to justify a death penalty verdict. It's all your doing. *Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are*

pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions [J.A. 9 (emphasis added).]

Following the prosecutor's closing argument, defense counsel responded with a one-page closing. The prosecutor then returned to make a second closing argument, and stated in conclusion:

[Following an argument about how Robert Sawyer should receive the death penalty even though his co-defendant, who was tried separately, received a life sentence:]

There is only one verdict that can be rendered in this case and there will be a strong symbolism related to that penalty. You the people are part of the criminal justice system. You now know how it works. Now is the time and I ask you that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend the death penalty. [J.A. 13 (emphasis added).]

The jury then received its instructions, and after deliberations returned a sentence of death on September 19, 1980. This death sentence was binding on the trial court under Louisiana law. See La. Code Crim. P., Art. 905.8 (1976).

Following appellate proceedings in which Robert Sawyer was represented by different counsel, present counsel filed a petition for certiorari and the conviction was vacated. See *State v. Sawyer*, 422 So.2d 95 (La. 1982), *vacated and remanded*, 463 U.S. 1223 (1983). Robert Sawyer's conviction became final on April 2, 1984. *Sawyer v. Louisiana*, 442 So.2d 1136 (La. 1983), *cert. denied*, 466 U.S. 931 (1984).

On May 8, 1984, Robert Sawyer filed a state post-conviction petition, raising twenty claims. Among them was a claim that was soon to be known as a "*Caldwell*" claim, namely that Robert Sawyer's Eighth and Fourteenth Amendment rights had been violated because the prosecutor's sentencing phase argument injected an arbitrary factor into the jurors' delibera-

tions by explicitly misleading them concerning their role as final judges in imposing the death sentence. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (decided on June 11, 1985). The state trial court denied the petition on the same day it was filed, without opinion. On appeal, the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The case was submitted on the record and the trial court denied the petition in an unpublished opinion. J.A. 72-86. On appeal the Louisiana Supreme Court remanded the case to the trial court again for an evidentiary hearing. The trial court denied the petition again at the close of the hearing, without opinion, giving oral reasons. J.A. 88-92. A closely divided Louisiana Supreme Court affirmed the trial court's ruling, by a vote of 4-3, without opinion. See *Sawyer v. Maggio*, 479 So.2d 360, *reconsideration denied*, 480 So.2d 313 (La. 1985).

Having exhausted his state remedies, Robert Sawyer filed a federal habeas corpus petition on January 20, 1986. The petition was assigned to a magistrate, who rejected all claims in an unpublished opinion of "Findings and Recommendations." J.A. 94-146. On the *Caldwell* claim, the magistrate found that the prosecutor's arguments "dangerously approach[ed] reversible error," but he also found that the "standard to be employed in determining whether prejudice resulted" from the arguments "is the 'reasonable probability' test for determining prejudice established by *Strickland v. Washington* [466 U.S. 668 (1984)]," and that this standard was not satisfied. J.A. 129, 132. The District Judge affirmed the magistrate's findings and recommendations in an unpublished order. J.A. 147-153.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision denying relief. *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).² The Court of Appeals granted rehearing En Banc on August 25,

² The panel rejected Robert Sawyer's claims of ineffective assistance of counsel and denial of due process and equal protection from his representation by a trial attorney unqualified to represent capital defendants under state law. The panel divided over the resolution of the *Caldwell* claim. See *Sawyer*, 848 F.2d at 599-606 (King, J. dissenting).

1988. After oral arguments, the En Banc Court requested supplemental briefs concerning three questions arising from this Court's decision in *Teague v. Lane*, 489 U.S. ___, 109 S. Ct. 1060 (1989). J.A. 212-213. One of these questions, "Does *Teague* apply to collateral attacks upon a sentencing proceeding in a capital case?", was answered in the affirmative by this Court, one month after supplemental briefs were submitted to the En Banc Court. See *Penry v. Lynaugh*, 489 U.S. ___, ___, 109 S. Ct. 2934, 2944 (1989). The other two issues remain questions of first impression in this Court: "Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test?" and "Does *Caldwell* announce a rule that falls within the fundamental fairness exception to the *Teague* rule?"

The En Banc Court issued opinions on August 15, 1989, dividing sharply over these two issues. Judge Higginbotham wrote for a majority of nine judges who found that *Caldwell* is "new law" and does not fall within *Teague*'s fundamental fairness exception. *Sawyer v. Butler*, 881 F.2d 1273 (5th Cir. 1989) (*en banc*). Judge King authored a dissent for five judges who would have found that *Caldwell* should be applied retroactively to Robert Sawyer's case, both because *Caldwell* was not "new law" and because *Caldwell* violations fall within *Teague*'s fundamental fairness exception. *Sawyer*, 881 F.2d at 1295. Judge King noted that if Robert Sawyer's case had been decided "on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted . . . the majority opinion would have granted him a new sentencing hearing." *Id.* at 1305. Judge Rubin expressed his concurrence with the views of the dissent, but did not vote. *Id.* at 1275 n.1.

This Court granted certiorari on January 16, 1990. J.A. 290.

SUMMARY OF ARGUMENT

The Court of Appeals majority erred because it held *Caldwell v. Mississippi* to be non-retroactive "new law," rejecting the view that *Caldwell* was dictated by this Court's precedents under the standards of *Teague v. Lane* and *Penry v. Lynaugh*. If the Court had correctly traced *Caldwell*'s antecedents in Eighth Amendment case law, it would have concluded that

Caldwell was indeed dictated by the principles in such precedents as *Woodson v. North Carolina*, *Gardner v. Florida*, *Lockett v. Ohio*, *Eddings v. Oklahoma*, *Zant v. Stephens*, and *California v. Ramos*. As *Caldwell* is "old law" under these precedents, the majority should have applied its rule to petitioner's case.

The majority's error was based on its misapprehension of *Penry*, which directs courts to consider Eighth Amendment precedents when the retroactive application of sentencing phase rights is at issue. Its error was also based on its misapprehension of *Teague v. Lane*, which directs federal courts to consider the state court perspective in making retroactivity rulings. By ignoring that perspective, the majority failed to find what any state court would have found at the time Robert Sawyer's conviction was final: *Caldwell* was a predictable evolution in Eighth Amendment law. The majority's search for *Caldwell*'s origin in the Due Process case of *Donnelly v. DeChristoforo* was misguided, because no state court would have regarded *Donnelly* as the starting point for analyzing *Caldwell* error in the era following *Gregg v. Georgia*.

The Court of Appeals majority also erred because it rejected the proposition that *Caldwell* should be applied retroactively under *Teague*'s "fundamental fairness" exception. If the majority had considered the policies behind this exception, and the implicit guidelines in *Teague* for identifying rights that fall within the exception, it would have found that the *Caldwell* rule qualifies as one insuring "fundamental fairness" under *Teague*. Instead, the majority misapprehended *Teague*, and relied on definitions of "fundamental fairness" from inapposite sources of doctrine that should not be transplanted into non-retroactivity law.

This Court should apply *Caldwell* retroactively to the Petitioner's case, either on the ground that it is "old law," or on the ground that it deserves this application under *Teague*'s exception. Once *Caldwell* is so applied, it becomes evident that Petitioner should win on the merits. The prosecutor in Petitioner's trial made false and misleading arguments that the jury's death verdict was non-final and reviewable for cor-

rectness by appellate courts. The *Caldwell* violation was focused, unambiguous, and strong, and it was not corrected by the trial judge or the prosecutor. Therefore, this Court should reverse the judgment of the Court of Appeals, and grant Petitioner a resentencing hearing under *Caldwell* in order to vindicate his Eighth Amendment rights.

ARGUMENT

I. *CALDWELL V. MISSISSIPPI* SHOULD BE APPLIED RETROACTIVELY TO GIVE ROBERT SAWYER A NEW SENTENCING HEARING AS A REMEDY FOR HIS PROSECUTOR'S FALSE AND MISLEADING STATEMENTS ABOUT THE NON-FINALITY OF THE JURY'S DEATH VERDICT. UNDER *TEAGUE V. LANE*, *CALDWELL* DESERVES RETROACTIVE APPLICATION BOTH BECAUSE IT WAS DICTATED BY PRIOR EIGHTH AMENDMENT LAW, AND BECAUSE IT RECOGNIZES A BEDROCK PROCEDURAL RIGHT THAT INSURES FUNDAMENTAL FAIRNESS IN ALL DEATH PENALTY TRIALS.

A. This Court's Decision in *Caldwell v. Mississippi* Was Dictated By Earlier Eighth Amendment Precedents And Thus Was Not "New Law" Under *Teague v. Lane* and *Penry v. Lynaugh*.

1. *Teague* and *Penry* Hold That *Caldwell*'s Retroactivity Status Is To Be Determined By Considering Whether The Rule In *Caldwell* Was Dictated By Eighth Amendment Precedents As Of The Time Robert Sawyer's Conviction Became Final. The Perspective Of State Courts Is The Touchstone Under *Teague*, And Those Courts Would Have Found *Caldwell* To Be A Predictable Development In Eighth Amendment Law.

To address the threshold issue whether *Caldwell v. Mississippi* should be applied retroactively to Robert Sawyer's case, it is necessary to articulate the *Caldwell* rule briefly and to assess its origin in the Eighth Amendment precedents. See *Teague v. Lane*, 489 U.S. —, —, 109 S. Ct. 1060, 1078

(1989) (plurality opinion),³ citing *Bowen v. United States*, 422 U.S. 916, 920 (1975); see *Penry v. Lynaugh*, 489 U.S. —, —, 109 S. Ct. 2934, 2953 (1989) (retroactivity is a threshold question); see *Penry*, 109 S. Ct. at 2944-2947, and *Sawyer v. Butler*, 881 F.2d 1273, 1276, 1281 (5th Cir. 1989) (en banc) (brief articulation of rule is appropriate). *Caldwell* requires resentencing when a capital sentencer "has been led to believe that responsibility for determining the appropriateness of the defendant's death lies elsewhere." *Caldwell*, 472 U.S. 320, 329 (1985). Specifically, *Caldwell* holds that the Eighth Amendment prohibits prosecutors from presenting false and misleading information to the sentencing jury concerning its responsibility as the final arbiter of death, because this information creates a risk that a death sentence may be based on a mistaken understanding of the sentencer's "awesome responsibility" for the death verdict. *Id.* at 329 (citing *McGautha v. California*, 402 U.S. 183 (1971)); *id.* at 328-334; *id.* at 341-343 (O'Connor, J., concurring).

As this Court has noted, the *Caldwell* rule has several distinctive features. First, the rule is an Eighth Amendment limitation on a particular kind of information: false and misleading information about the power of other authorities, like appellate courts, to modify the jury's death verdict. See *Darden v. Wainwright*, 477 U.S. 168, 183-184 n.15 (1986). Second, this limitation is based on the perception that such misinformation creates an unpredictable risk of unreliable death verdicts, and that this risk is prejudicial. *Caldwell*, 472 U.S. at 320, 330-333, 340, 341; *id.* at 343 (O'Connor, J., concurring). Third, this risk is held to be unacceptable when false and misleading information is presented in a clear and direct way, and when that information is not corrected in a clear and direct way. *Id.* at 340, & 340-341 n.7 (false and misleading information that is "focused, unambiguous and strong," and "uncorrected" expressly by the trial judge requires new hearing); *id.* at 343 (O'Connor, J., concurring). Under these conditions, a resentencing hearing must be provided, because it

³ The *Teague* plurality opinion will be referred to as the *Teague* opinion throughout this brief.

cannot be said that this kind of uncorrected misinformation had "no effect" on the sentencing decision. *Caldwell*, 472 U.S. at 341.

Under *Teague* and *Penry*, the pertinent question is what view a state court would have taken of a claim based on this kind of rule at the time Robert Sawyer's conviction became final on April 2, 1984. See *Penry*, 109 S. Ct. at 2944. *Teague* prescribes non-retroactivity for constitutional rules that "break new ground or impose a new obligation on the States or the Federal Government" or that announce a result that "was not dictated by precedent." *Penry*, 109 S. Ct. at 2944 (quoting *Teague* with emphasis in original). Conversely, retroactive application of Eighth Amendment rights is appropriate when it would to serve "as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles." *Teague*, 109 S. Ct. at 1073 (quoting *Desist v. United States*, 394 U.S. 244, 262-263 (1969) (Harlan, J., dissenting)). As *Penry* reveals, the retroactivity inquiry should be focused on the expectations generated by previously established constitutional decisions concerning the actions to be taken by state courts, who were charged with the duty of applying Eighth Amendment precedents conscientiously to the evolving problems that came before them. See *Penry*, 109 S. Ct. at 2945-2947.

If state courts would have regarded *Caldwell* as a predictable development in Eighth Amendment law, then the retroactive application of *Caldwell* will not cause them to suffer the frustration of "faithfully apply[ing] existing constitutional law only to have a federal court discover . . . new constitutional commands" later on habeas. *Teague*, 109 S. Ct. at 1075 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982)). Further, if state courts would have expected *Caldwell* to emerge from established constitutional principles, then the retroactive application of *Caldwell* is an appropriate means of assuring that those principles were indeed applied "faithfully." For, when retroactive "holdings can be reasonably anticipated, some incentive may be provided for those who will be affected in the future to seek to conform in advance to the expected standards." Mish-

kin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 72 (1965).

Here, the appropriate expectation of the state courts is demonstrated by their actual behavior. It is clear that state courts before *Caldwell* overwhelmingly endorsed the *Caldwell* rule. See cases cited in note 4 *infra*. This Court's opinion in *Caldwell* affirmed the importance of this state consensus as support for its rule. See *Caldwell*, 472 U.S. at 333-334 & nn. 4 & 5. (By contrast, other constitutional principles have been found to be old law rules, deserving of retroactive application, even where the state courts were deeply divided over the predictability of those rules, and where little or no state support for those rules could be discerned. See *Yates v. Aiken*, 484 U.S. 211, 217 (1988); compare *Penry*, 109 S. Ct. at 2945-2947 (holding that *Penry's* claim was not new law) with *Selvaugh v. Lynaugh*, 842 F.2d 89, 92-94 (5th Cir. 1988), *cert. granted*, 110 S. Ct. 231 (1989) (*Penry's* claim had enjoyed no support in the state courts).

There were two sources of support for state court endorsement of *Caldwell* during the early years after *Furman v. Georgia*, 408 U.S. 238 (1972). Some state courts enjoyed a tradition of "fair trial" case law that included explicit condemnation of "*Caldwell*" violations in capital and even non-capital cases. See, e.g., *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985). Others, however, created a "*Caldwell*" rule only in the post-*Gregg* era, relying on their obligations to give meaningful appellate review to death verdicts in a way that would eliminate "arbitrary factors" from influencing sentencing juries. See *Gregg v. Georgia*, 428 U.S. 153, 198, 204, 207-208 (1976) (emphasizing the need for appellate review of verdicts to eliminate arbitrary factors in sentencing); *State v. Sonnier*, 379 So.2d 1336, 1370 (La. 1980), *cert. denied*, 463 U.S. 1229 (1983) (explaining the obligation to review death verdicts for arbitrary factors in order to meet constitutional criteria under *Gregg*-approved procedure for state supreme court review). See also La. Code Crim. P., Art. 905.9 (imposing obligation on state supreme court to conduct review that will satisfy "constitutional criteria"). Some courts expressly referred to Eighth Amendment principles in articulating the

need for a *Caldwell* rule in the pre-*Caldwell* era. See, e.g., *State v. Willie*, 410 So.2d 1019, 1033 (La. 1982), cert. denied, 465 U.S. 1051 (1984) (reversing for “*Caldwell*” error and noting that the discussion of future disposition of death verdicts “encourages the jury to exercise unbridled discretion reminiscent of the latitude found constitutionally objectionable . . . in *Roberts v. Louisiana* [428 U.S. 325 (1976)]”). See also *State v. Robinson*, 421 So.2d 229, 233-234 (La. 1982) (reversing for “*Caldwell*” error).

Most states that endorsed the *Caldwell* rule before *Caldwell* did so by 1982. See, e.g., *State v. Berry*, 391 So.2d 406, 418 (La. 1980), cert. denied, 451 U.S. 1010 (1981), and cases cited in note 4 *infra*. However, this Court’s Eighth Amendment precedents after 1982 provided still further support for the *Caldwell* rule, and all of the Eighth Amendment precedents cited in *Caldwell* were conspicuous features of the constitutional landscape that was presented to a state court at the time when Robert Sawyer’s conviction became final. See *Caldwell*, 472 U.S. at 323, 339-341 (Eighth Amendment precedents without exception predate 1984). A consideration of the principles and applications contained within these precedents reveals that *Caldwell* broke no new ground and imposed no new obligation on the states. Rather, *Caldwell* was dictated by its precedents because it simply applied “well-established constitutional principle[s] to govern a case which [was] closely analogous to those which [were] previously considered in the prior case law.” *Mackey v. United States*, 401 U.S. at 667, 695 (1971) (separate opinion of Harlan, J.), quoting *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (quoted in *Penry*, 109 S. Ct. at 2944.)

2. At The Time Robert Sawyer’s Conviction Became Final, State Courts Would Have Found The *Caldwell* Rule Rooted In *Woodson v. North Carolina*, *Gardner v. Florida*, *Lockett v. Ohio*, *Eddings v. Oklahoma*, *California v. Ramos*, and *Zant v. Stephens*.

In considering the Eighth Amendment landscape in 1984, a state court would have found the *Caldwell* outcome both predictable and unexceptional. The only alternative result would

have been to hold that a prosecutor could always present false and misleading information about the non-finality of a death verdict to a jury, as long as the record contained boilerplate references to the fact that jury’s responsibility was to come to a life or death verdict. See *Caldwell*, 472 U.S. at 349-352 (Rehnquist, J., dissenting) (describing the alternative approach whereby boilerplate remarks may be found to cure all false and misleading remarks that fall short of an express assertion that appellate courts correct erroneous death verdicts). Since these sorts of boilerplate references are likely to exist in every death penalty case, a state court would have been compelled to choose between (a) tolerating a significant risk of jury misunderstanding of its sentencing powers as consistent with the Eighth Amendment, or (b) adopting the *Caldwell* rule. Under this Court’s precedents, there was strong support for adopting *Caldwell*, and scant support for adopting the alternative of tolerating false and misleading information as a sentencing factor that could lead to mistaken death verdicts.

There were two aspects of this Court’s Eighth Amendment precedents that would have provided guidance to a state court faced with the decision whether to adopt a “*Caldwell*” solution before *Caldwell* itself was decided. One was a consistent set of four broad Eighth Amendment principles that were consistently reaffirmed throughout the era from 1976 to 1984.

The first of these principles established, as an indispensable prerequisite to a reliable death verdict, that the sentencer be able to consider and give effect to all relevant characteristics of the offense and the offender, in order to reach an individualized sentencing determination. See *California v. Ramos*, 463 U.S. 992, 1000-1001 & n.13 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). See also *Caldwell*, 472 U.S. at 330-331. Second, the cases established that a verdict required a higher degree of “reliability” in the death sentencing process than in other contexts, because of the finality of the extreme penalty. See *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983); *Eddings*, 455 U.S. at 110 (plurality opin-

ion); *Lockett*, 438 U.S. at 604 (plurality opinion); *Gardner*, 430 U.S. at 364 (White, J., concurring); *Woodson*, 428 U.S. at 305 (plurality opinion). *Accord*, *Caldwell*, 472 U.S. at 323, 330, 340.

A third broad principle in this Court's precedents emphasized the vital nature of careful appellate scrutiny and sensitivity to error, as safeguards for insuring that no improper factors interfered with individualization of sentences and reliability of verdicts. See *California v. Ramos*, 463 U.S. at 998-999 & n.9 (citing cases). *Accord*, *Caldwell*, 472 U.S. at 329. A fourth principle emphasized that the "risk" of unreliability was itself an Eighth Amendment harm, whenever such a risk was created by errors that interfered with the sentencer's individualization of death verdicts. See *Zant*, 462 U.S. at 885; *Eddings*, 455 U.S. at 118-119 (O'Connor, J., concurring); *Lockett*, 438 U.S. at 605 (plurality opinion); *Gardner*, 430 U.S. at 359 (plurality opinion). *Accord*, *Caldwell*, 472 U.S. at 330-333 (focusing on the dangers and risks of unreliability inherent in *Caldwell* error).

A state court faced with these four broad principles could not plausibly conclude that settled Eighth Amendment jurisprudence would permit it to condone false and misleading information about the non-finality of a death verdict. Rather, this Court's emphasis on careful appellate court scrutiny of errors that pose a risk of unreliability would lead a state court to reason that *Caldwell* errors should be cause for resentencing hearings. State courts before *Caldwell* would have understood that *Caldwell* error required Eighth Amendment correction, because it creates the risk of unreliable death sentences through misguided use of the death penalty by sentencers who misunderstand their responsibility.

Justice Harlan's telling phrase about "awesome responsibility" described the aspiration for sentencer behavior that was at the heart of the Court's acceptance of the death penalty. Compare *Caldwell*, 472 U.S. at 329-330. This responsibility included the burden of being the only decisionmaker who was obligated to take all mitigating circumstances into account in making the decision whether a defendant should live or die.

Accord, *Caldwell*, 472 U.S. at 329-333. Undermining the sentencer's responsibility therefore threatened the Eighth Amendment premise that:

It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice, or emotion.

Gardner, 430 U.S. at 358 (plurality opinion). Sentencers deluded about their responsibilities cannot deliver death verdicts based on reason.

In addition to these four broad Eighth Amendment principles pointing to the *Caldwell* ruling, there were two narrower principles in this Court's precedents that would lead state courts to find the risks of unreliability from *Caldwell* error to be "unacceptable and incompatible with the commands of the Eighth Amendment and the Fourteenth Amendment." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)). This Court's actual applications of these two narrow principles would lead a state court to believe that *Caldwell* error was unacceptable, both because it interfered with a sentencer's responsible consideration of mitigating evidence, and because it interjected false information into a sentencer's deliberations and thereby tainted their reliability.

First, the broad *Woodson* principle that individualized mitigating evidence should be considered by a sentencer had evolved into the narrower *Lockett* principle that no sentencer could be precluded from considering such evidence. *Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 604. The application of this principle in *Lockett* and *Eddings* made it clear that preclusion of the informed consideration of mitigating evidence was an Eighth Amendment violation, no matter what means were used to effect that preclusion. *Lockett*, 438 U.S. at 608 (condemning a statutory bar that effected preclusion); *Eddings*, 455 U.S. at 114-115 (condemning sentencer misunderstanding or jury instructions that effect preclusion). The result of preclusion was the risk of misunderstanding by the sentencers of their responsibilities to consider fully all mitigating evidence.

This risk was the constitutional harm remedied in *Lockett* and *Eddings*.

Under *Woodson*, *Lockett* and *Eddings*, it would be clear to a state court that a prosecutor could not argue constitutionally to jurors that they should take no account of mitigating evidence in deliberating on a death verdict. By analogy, a *Caldwell* argument, disparaging the jurors' attending to mitigation by falsely informing them that they did not have the ultimate responsibility for assessing mitigating circumstances, would have fared no better constitutionally. State courts consistently were urged to look behind the form of arguments and instructions, and consider the actual effect that words or messages would have on lay jurors. See, e.g., *Zant*, 462 U.S. at 888-889 (emphasizing the actual effect a jury instruction would have on lay jurors in context); *Ramos*, 463 U.S. at 1002-1003 & n.17 (same). Accord, *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring) (emphasizing the misleading nature of technically accurate *Caldwell* arguments about appellate review, because of laypersons' lack of appreciation for its limited nature). The effect of misleading jurors concerning their responsibility to act as the final arbiter of death would be to create a risk of their misunderstanding also their responsibility to act as the authoritative evaluators of mitigating evidence. See also *Caldwell*, 472 U.S. at 330-331 & 332.

A second set of narrow Eighth Amendment principles also dictated that state courts view *Caldwell* error as creating an unacceptable risk of unreliable death verdicts. Both *Ramos* and *Zant* counseled state courts to consider the accuracy of sentencing information that was provided to the jury, in assessing the constitutionality of the procedure which provided such information. *Ramos*, 463 U.S. at 1011 (stressing the accuracy of a challenged instruction); *Zant*, 462 U.S. at 887 (stressing that the accuracy of the aggravating circumstance at issue was "unchallenged.") The *Ramos* and the *Zant* opinions clearly implied that false sentencing information could not be upheld under the rationales used to uphold true information. See *Ramos*, 463 U.S. at 1004, 1009, 1012 (repeatedly emphasizing accuracy of instruction); *Zant*, 462 U.S. at 887 n.23 (noting that even non-capital sentences must be set aside when based on

"misinformation of constitutional magnitude," citing *United States v. Tucker*, 404 U.S. 443, 447-449 (1972) and *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948)). The impropriety of allowing false information to be presented to a sentencer was also established in *Gardner*, where this Court prohibited the sentencer's use of undisclosed and unchallengeable, and hence potentially false information. *Gardner*, 430 U.S. at 360-362 (plurality opinion); *id.* at 363-364 (White, J., concurring).

Given the false and misleading qualities of *Caldwell* argument, a state court would conclude that the proper remedy for the interjection of this misinformation into jury deliberations was a resentencing hearing. Such misinformation could not be deemed acceptable under *Ramos*, or *Zant*. Indeed, information with only the potential to be false had been condemned in *Gardner*. Additionally, this misinformation about a sentencer's authority posed the danger of unreliable death verdicts under *Woodson*, *Lockett*, and *Eddings*. Jurors' misunderstanding of their final responsibility for assessing mitigating evidence would deprive the defendant of an individualized verdict, "based on a process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring). See also *id.* at 115 n.10 (plurality opinion) ("*Lockett* requires the sentencer to listen.")

These Eighth Amendment precedents established both a need and a means to erect a safeguard against the harmful consequences of *Caldwell* argument. By ordering resentencings, the state courts provided an incentive for prosecutors to avoid false and misleading *Caldwell* arguments and for trial judges to act swiftly to countermand a prosecutor's misinformation with correct instructions about the limitations of appellate court powers. See *Caldwell*, 472 U.S. at 340-341 n.7 and see *id.* at 343 (O'Connor, J., concurring) (describing need for explicit correction of misinformation). Had the state appellate courts failed to order resentencings on the grounds that boilerplate references to juror responsibility could "cure" *Caldwell* violations, they would have created no such incentives. Had the state courts adopted the view that *Caldwell* error could be tolerated in such cases of boilerplate "cures," their

decisions would have contradicted this Court's explicit and implicit directives in prior case law. It is little wonder that after *Furman*, the state courts overwhelmingly endorsed *Caldwell* in capital cases for the same reasons that would lead this Court to ratify their views in 1985.⁴

⁴ See, e.g., *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (remarks condemned, reversal required, remarks divert jurors from true responsibility for death verdict by implying responsibility will fall elsewhere); *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky.), cert. denied, 469 U.S. 860 (1984) (remarks condemned, reversal required, remarks convey to the jurors that their awesome responsibility is lessened because the decision is somehow not final); *Wiley v. State*, 449 So.2d 756, 762 (Miss. 1984), cert. denied, 429 U.S. 906 (1986) (remarks condemned, reversal required, remarks lessen individual juror's sense of awesome responsibility for fate of defendant, and give jurors false comfort that they have advisory role, when "all notions of justice" require jurors to appreciate the gravity of their decision); *Williams v. State*, 445 So.2d 798, 811-812 (Miss. 1984), cert. denied, 469 U.S. 1117 (1985) (remarks condemned, reversal required, remarks give jury false comfort and lessen awesome responsibility); *State v. Robinson*, 421 So.2d 299, 233-234 (La. 1982) (remarks condemned, reversal required, remarks lessen jurors' awesome responsibility, divert attention from sentencing issue of appropriateness of death, mislead lay jurors about the powers of appellate courts, and interject irrelevant matters into the deliberations); *State v. Willie*, 410 So.2d 1019, 1033-1035 (La. 1983), cert. denied, 465 U.S. 1051 (1984) (remarks condemned, reversal required, remarks diminish jurors' responsibility and sense of accountability); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425, 427-429 (1979) (remarks condemned, reversal required, remarks will be likely to result in jurors' reliance on the Supreme Court for ultimate determination of the sentence); *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979) (remarks condemned, reversal required, remarks imply responsibility for death is lessened, and divert the jury from deciding the punishment on the evidence); *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559, 566 (1979) (remarks condemned, reversal required, remarks imply responsibility for death is lessened, and divert the jury from deciding the punishment on the evidence); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977) (remarks condemned, reversal required); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37, 40 (1977), cert. denied, 444 U.S. 885

A striking aspect of the state courts' endorsement of the *Caldwell* solution is the similarity of their reasoning to the reasoning that was ultimately adopted in the *Caldwell* opinion. Louisiana's own "*Caldwell*" decisions provide an apt example. See, e.g., *State v. Robinson*, 421 So.2d 229 (La. 1982); *State v. Willie*, 410 So.2d 1019 (La. 1982). Every one of the Louisiana Supreme Court's rationales for condemning prosecutorial references to appellate review in *Willie* and *Robinson* was ratified in *Caldwell*.⁵ Conversely, each of the distinctive substantive

(1979) (remarks condemned, reversal required, remarks divert jury from basing verdict on evidence, suggest jurors' heavy burden can be passed on to appellate court, and have unusual potential for corrupting the sentencing process); *State v. White*, 286 N.C. 395, 211 S.E.2d 445, 450 (1975) (remarks condemned, reversal required, remarks suggesting that jurors share responsibility with others for death verdict are prejudicial, remarks are intended to overcome natural reluctance to give a death verdict, lay jurors cannot understand the technicalities of the fact-or-law review distinction); *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365, 367-368 (1975) (remarks condemned, reversal required, remarks encouraged jury to take less than full responsibility for its awesome task, and remarks may have influenced the jury to give death when unbiased judgment would have given life, as jurors weigh imponderables in sentencing deliberations); *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201, 204-207 (1975) (remarks condemned, reversal required, remarks would dilute solemn obligation of jury, which has sole responsibility for death verdict).

⁵ Four rationales for the *Caldwell* rule are prefigured with clarity in the Louisiana decisions. First, remarks about appellate review can mislead laypersons. Compare *Caldwell*, 472 U.S. at 330, 331, with *Robinson*, 421 So.2d at 234. Second, these misleading remarks divert a jury's attention from the sentencing issue, and interject irrelevant matters into the jurors' weighing of sentencing criteria. Compare *Caldwell*, 472 U.S. at 331-332, with *Robinson*, 421 So.2d at 233-234. Third, such references also suggest that a juror's awesome responsibility may be lessened. Compare *Caldwell*, 472 U.S. at 330, 333, with *Robinson*, 421 So.2d at 233, and *Willie*, 401 So.2d at 1034. Fourth, it is imperative that the jurors' discretion in a capital case should be protected from the influence of such arbitrary factors, because jurors are supposed to exercise discretion with the appreciation that they are accountable for the death verdict. Compare *Caldwell*, 472 U.S. at 329-333, with *Willie*, 410 So.2d at 1035.

ingredients of *Caldwell*'s rule was also mirrored in the Louisiana case law.

A second striking aspect of the state courts' endorsement of the *Caldwell* rule is their consensus that all of the distinctive ingredients of *Caldwell* were necessary in order to achieve an effective solution to the *Caldwell* problem.⁶ State courts

⁶ For example, the distinctive ingredients of *Caldwell*'s rule are mirrored in the Louisiana case law that anticipated the arrival of the rule. The Louisiana Court's ban on false and misleading messages which suggest that the jurors' "awesome responsibility is lessened by the fact that their decision is not the final one" is matched by the *Caldwell* Court's ban on messages that lead the jury "to believe that responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Compare State v. Berry*, 391 So.2d 406, 418, with *Caldwell*, 472 U.S. at 320. The Louisiana Court's requirement that improper comments be more than brief or innocuous is matched by *Caldwell*'s requirement that remarks should be "focused, unambiguous, and strong." *Compare State v. Knighton*, 436 So.2d 1141, 1158 (La. 1983), cert. denied, 465 U.S. 1051 (1984) with *Caldwell*, 472 U.S. at 340. The Louisiana Court's premise that new hearings must be afforded where "we cannot say that the jury's sentencing decision was unaffected" by misleading prosecutorial remarks is echoed in *Caldwell*'s conclusion that reversal is necessary where "we cannot say that [the argument] had no effect on the sentencing decision." *Compare Robinson*, 421 So.2d at 234, with *Caldwell*, 472 U.S. at 341. The Louisiana Court's blueprint for *Caldwell* error is no different from the blueprint developed by other state courts in the pre-*Caldwell* era. See, e.g., cases cited in note 4 *supra*. For example, with regard to the proper correction standard for *Caldwell* error, the Kentucky Court held that "should any inadvertent reference implying a diminution [sic] of the jury's duty in fixing a death penalty creep into any case, the trial judge should immediately inform the jury that their duty to fix the death penalty should be considered as if there were no possibility of review by any source." *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985). *Compare Caldwell*, 472 U.S. at 339-340, 340-341 n.7; id. at 343 (O'Connor, J., concurring) (describing need for express correction). With regard to the presumed prejudicial effect of *Caldwell* error, some state courts actually expressed the "presumed effect" concept in so many words. See, e.g., *State v. Robinson*, 4421 So.2d at 234 (La. 1982) ("we cannot say that the jury's sentencing

understood that false and misleading information about the non-finality of a jury's death verdict created a risk of Eighth Amendment harm that must affirmatively be dispelled. They understood that because under the Eighth Amendment precedents, this risk was "unacceptable," it could not be brushed aside on the basis of assumptions that no prejudice accrues to a defendant as long as boilerplate remarks about responsibility are present in the record. Thus, once the state courts found that false and misleading information was conveyed to a capital jury in a clear and direct way and was not corrected in a clear and direct way, they concluded that the presumptive effect was one of prejudice. Or, as this Court was to state in a similar way in *Caldwell* itself, once error is clear and is not corrected, reversal is required "[b]ecause we cannot say that this [error] had no effect on the sentencing decision." *Id.* at 472 U.S. at 341.

Caldwell's rule was thus foreseen by the state courts to be dictated by the Eighth Amendment precedents. Those precedents provided no support for a contrary rule. No prosecutor in the pre-*Caldwell* era could have relied on the notion that false and misleading information about appellate court review was proper argument. No state court could have relied on any Eighth Amendment precedent to support the idea that such misleading information was harmless to the sentencing process. *Teague* suggests that the absence of any basis for reliance goes to the heart of the retroactivity inquiry, because the very

decision was unaffected" by the misleading argument); *State v. Jones*, 251 S.E.2d 425, 429 (N.C. 1979) (any reference "which would have the effect of minimizing in the jury's minds their role" is precluded, as "such reference will, in all likelihood, result in the jury's reliance" on an appellate court); *Prevatte v. State*, 214 S.E.2d 365, 368 (Ga. 1975) (a reference to appellate review is likely to be cause for reversal of a death verdict because "in the weighing of imponderables it cannot be concluded that the jury were not influenced by such statements"). In other cases, the state courts simply applied the "presumed effect" concept by reversing death verdicts because of bad arguments without inquiring into the actual impact of the argument upon the verdict in light of the totality of the remarks on the record or the evidence. See, e.g., cases cited in note 4 *supra*.

purpose of non-retroactivity is to avoid the frustration of state courts that have "faithfully appl[ie]d existing constitutional law" to solve particular problems. *Teague*, 109 S. Ct. at 1075.⁷

This Court's pre-*Teague* retroactivity case law also supports a holding that *Caldwell* was "old law" because it was predictable according to the principles of prior Eighth Amendment decisions. See, e.g., *Solem v. Stumes*, 465 U.S. 638, 646 (1984); *United States v. Johnson*, 457 U.S. 537, 549-50 (1982). *Caldwell* bears none of the earmarks that qualified various cases in the pre-*Teague* era for non-retroactive application on the grounds that state courts and prosecutors relied on prior precedents, sanctioned practices, or "longstanding and widespread practices . . . which a near-unanimous body of lower court authority has expressly approved." *Johnson*, 457 U.S. at 551.

One final piece of evidence that Eighth Amendment precedents provided no support for a different approach than *Caldwell* took to the *Caldwell* problem is provided by the prosecutor's arguments in the *Caldwell* case itself. When the prosecutor in *Caldwell* needed authority to contest the soundness of the *Caldwell* rule, he was forced to reach back to the

⁷ The Louisiana Supreme Court's reaction to the *Caldwell* decision exemplifies that of a state court which views *Caldwell* as an old, and unremarkable piece of law dictated by Eighth Amendment principles. In 1988 the Court noted that *Caldwell* "did not change our previous case law," and therefore rejected on the merits the *Caldwell* claim of a post-conviction petitioner whose pre-*Caldwell* claim had been rejected on appeal. *State ex rel. Busby v. Butler*, 538 So.2d 164, 173 (La. 1988). In *Busby*, the Court stated that the defendant raised an "Eighth Amendment" claim, and stated, "We addressed this issue on direct appeal [before *Caldwell*]." Likewise, in its first two post-*Caldwell* cases, the Louisiana Court relied upon its own pre-*Caldwell* cases for the relevant standard to be applied, and treated *Caldwell* as supplemental authority. *State v. Jones*, 474 So.2d 919, 930-932 (La. 1985), cert. denied, 476 U.S. 1178 (1986); *State v. Clark*, 492 So.2d 862, 870-871 (La. 1986). See also *State v. Smith*, 554 So.2d 676, 685 (La. 1989) (citing *Caldwell* and Louisiana pre-*Caldwell* cases interchangeably).

pre-*Gregg* era and invoke the Due Process case of *Donnelly v. DeChristoforo* as precedent for a "boilerplate" correction approach to *Caldwell* error. See *Caldwell*, 472 U.S. at 337-340 (rejecting this approach and discussing *Donnelly*, 416 U.S. 637 (1974)). See also *id.* at 335-336 and see *id.* at 341-342 (O'Connor, J., concurring) (both opinions rejecting the unsupportable claim that *Ramos* implied that states are free to expose sentencing juries to any information and argument concerning postsentencing proceedings).

The Fifth Circuit majority below incorrectly held *Caldwell* to be "new law" under *Teague* because it took the very same approach that the prosecutor did in his losing argument in *Caldwell*. The majority ignored this Court's direction in *Penry*, and did not consider whether *Caldwell* was dictated by the Eighth Amendment precedents that animated its reasoning. Instead, the Fifth Circuit majority reached back to *Donnelly v. DeChristoforo* and found that *Caldwell*'s Eighth Amendment rule was new by comparison to *Donnelly*'s 1974 Due Process doctrine. *Sawyer*, 881 F.2d at 1282-1287, 1290-1293; see, e.g., *id.* at 1281 ("whether *Caldwell* is a new rule . . . [depends] upon the relation between *Caldwell* and *Donnelly*"). As we show in the following subsection, the Fifth Circuit's failure to find that *Caldwell* was "old law" is a mistake, and must be corrected by this Court, because that failure was based on an analysis that is inconsistent with *Teague*, with *Penry*, and with the *Caldwell* opinion.

3. The Fifth Circuit Majority Erred In Holding *Caldwell* "New Law" Because It Misinterpreted The *Teague* and *Penry* Decisions And Misapprehended The Relationship Between *Donnelly v. DeChristoforo* And *Caldwell*. The Majority's View Of *Caldwell* Must Be Rejected Because It does Not Reflect The Perspective Shared By State Courts Which Regarded *Donnelly* As Irrelevant To The *Caldwell* Problem In The Pre-*Caldwell* Era.

The majority below relied on three erroneous assumptions in rejecting the proposition that *Caldwell* was "old law." Had it not been led astray by these errors, it would have seen that

Caldwell deserves retroactive application as a case that simply applied well-established constitutional principles to govern the problem of false and misleading sentencing information. As the Fifth Circuit dissenters observed,

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence.

....

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than *Penry*'s for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*.

Sawyer, 881 F.2d at 1298, 1299 (King, J., dissenting).

The Fifth Circuit majority's first error was to assume that *Penry*'s retroactivity analysis is, in effect, good for one case only. See *Sawyer*, 881 F.2d at 1288, 1290. The analysis in *Penry* is not limited to the "unique" facts of *Penry* or a "unique" development in Texas law. Rather, retroactivity in *Penry* is analyzed in terms established in *Teague*, by beginning with Justice Harlan's understanding of old law. *Penry*, 109 S. Ct. at 2944. Evolving rules may be treated as old law when they simply apply established principles to govern analogous cases. *Id.*, citing *Mackey*, 401 U.S. at 695 (separate opinion of Harlan, J.). The first step of the Harlan inquiry in *Penry* is a comparison of the rule *Penry* seeks with the Eighth Amendment premise that individualized sentencing is "indispensable" to reliable death verdicts. *Penry*, 109 S. Ct. at 2945, citing *Woodson*, 428 U.S. at 304. The second step is a comparison of *Penry*'s claim with the obligations imposed in *Jurek*, *Lockett*, and *Eddings* to interpret state law so as to allow sentencing juries to consider relevant mitigating evidence. *Penry*, 109 S. Ct. at 2946 (analyzing cases including *Jurek v. Texas*, 428 U.S. 262 (1976)). The last step of retroactivity analysis is an analysis that the *Lockett* and *Eddings* principle that bars preclusion of the sentencer's consideration of mitigating evidence may be applied to the analogous claim in *Penry*. *Penry*, *id.* at 2946-2947.

By disregarding this analysis, the Fifth Circuit majority stood *Teague* on its head. The essence of *Teague* is that a federal court must consider how the state courts would have viewed a *Caldwell* issue at the time Robert Sawyer's conviction became final. See *Teague*, 109 S. Ct. at 1073-1075. An issue of false and misleading information being presented to a sentencing jury would have required state courts to examine this Court's specialized Eighth Amendment precedents dealing with state death penalty questions between the time of *Gregg* and that of *Zant* and *Ramos*. Yet the Fifth Circuit majority declined to consider these precedents, and reached back to the pre-*Gregg* era to take guidance from the Due Process doctrine in *Donnelly* instead. Thus, by disregarding *Penry*, the majority began its search for *Caldwell* precedents, in the name of *Teague*, by eliminating the entire Eighth Amendment landscape where such precedents were located. *Sawyer*, 881 F.2d at 1290 (*Teague* can be followed by treating *Penry* as a "special" case); *id.* at 1290-1291 (holding *Caldwell* to be a new rule without consideration of its Eighth Amendment precedents).⁸

The majority's failure to heed *Penry*'s guidance produced a view of the *Caldwell* rule that completely fails to take account of the state courts' views and decisions. No state court would similarly have ignored the Eighth Amendment case law in addressing a *Caldwell* problem, or have reached back to *Donnelly* in preference to Eighth Amendment precedents. This is evident for two reasons. First, this Court had expressly advised state courts in the post-*Gregg* era that they should not rely on old Due Process cases when considering death sentencing procedures. See *Gardner*, 430 U.S. at 356-358 (rejecting *Williams v. New York*, 337 U.S. 241 (1949) as inapposite). Thus, no state court would have considered *Donnelly*'s Due

⁸ The Fifth Circuit majority stated that Robert Sawyer "has two arguments" that *Caldwell* is old law, and then rejected them. *Sawyer*, 881 F.2d at 1291. The majority failed to mention that Robert Sawyer consistently argued that *Caldwell* was descended from, and dictated by, Eighth Amendment precedents. See Petitioner's Supplemental Circuit Brief at 15-19, and Petitioner's Supplemental Circuit Reply Brief at 3-7.

Process doctrine to be the controlling law on the *Caldwell* problem.

Second, no state court in the pre-*Caldwell* era did, in fact, rely on *Donnelly* as a relevant doctrine for addressing the *Caldwell* problem. *Donnelly* was cited by courts in twenty-seven states in at least seventy-six cases in that era. Yet in no case did any state court refer to *Donnelly* analysis in assessing or rejecting a *Caldwell* claim. See cases cited in Appendix B, *infra*. Notably, *Donnelly* was not discussed or even cited in any of the fourteen state decisions embracing the *Caldwell* rule in capital cases between *Furman* and *Caldwell*. See cases in note 4 *supra*. The state courts knew that the *Caldwell* problem was an Eighth Amendment problem in the post-*Gregg* era. The Fifth Circuit majority missed this point entirely by failing to take proper account of the state courts' perspective.

Finally, the Fifth Circuit majority's decision to eliminate the Eighth Amendment landscape caused it to ignore the evidence of *Caldwell*'s ancestry presented in the *Caldwell* opinion itself. This Court's justifications for the *Caldwell* rule are anchored in Eighth Amendment analysis with repeated citations to precedents such as *Ramos*, *Eddings*, *Lockett*, *Gardner*, and *Woodson*. See *Caldwell*, 472 U.S. at 323, 329-333 & 329 n.2, 335-336, 340 & 340-314 n.7; *id.* at 342, 343 (O'Connor J., concurring). Yet the majority did not analyze *Caldwell*'s relationship to any of these precedents upon which its holding and reasoning relied. By contrast, the Fifth Circuit dissenters correctly followed *Penry* and *Teague*, by tracing the genesis of *Caldwell* through all of the relevant Eighth Amendment precedents, and thereby concluded that *Caldwell*'s rule was old law. *Sawyer*, 881 F.2d at 1298.⁹

The second error of the Fifth Circuit majority was to assume that the *Teague* opinion calls for ignoring state court implemen-

⁹ Compare *Hopkinson v. Shillinger*, 888 F.2d 1286, 1288-1291 (10th Cir. 1989) (*en banc*) (holding that *Caldwell* is "new law" under *Teague* while failing to consider any of its relevant Eighth Amendment precedents, and relying instead on the *Caldwell* dissent's view of *Caldwell*'s lack of precedents). *Hopkinson* is wrong for the same reasons that the Fifth Circuit majority is wrong about *Caldwell*.

tation of the *Caldwell* principle in the pre-*Caldwell* era for the purpose of assessing the "new law" status of *Caldwell*. See *Sawyer*, 881 F.2d at 1290-1291. This error is based upon the majority's belief that consideration of state court law "cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*." *Sawyer*, 881 F.2d at 1290 (referring to *Ford*, 477 U.S. 399 (1986)). However, there is no reason to think that *Ford* cannot be squared with this Court's retroactivity analysis—both in *Teague* and in pre-*Teague* cases—which consistently has treated state court decisions as a relevant source for understanding whether a rule is old law or new law. *Teague* does not offer *Ford* as an example of rejection of state-court decisions. *Teague* simply cites *Ford* as an example of a "new rule," no doubt because *Ford* overruled *Sollesbee v. Balkcom*, 339 U.S. 9 (1950). See *Teague*, 109 S. Ct. at 1070. Thus, there is nothing in either *Ford* itself or *Teague*'s reference to *Ford* to suggest that state court decisions should not be considered in determining whether *Caldwell* is old law or new law.

The Fifth Circuit dissenters correctly assessed the positive nature of state court support for the *Caldwell* rule in the pre-*Caldwell* era. This support demonstrates that *Teague* retroactivity policies will not be violated if *Caldwell* is applied retroactively, because the expectations of state courts will not be injured by this application. As Judge King stated,

[The] widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

Sawyer, 881 F.2d at 1301 (King J., dissenting). Compare *Solem*, 465 U.S. at 647-649 (considering how a traditional basis for non-retroactivity is the need for state courts and prosecutors to be entitled to rely upon old law, and not be forced to anticipate unexpected new rules).

The third error of the Fifth Circuit majority pervades its entire retroactivity analysis and underlies its failure to consider *Caldwell*'s roots in Eighth Amendment precedents. The majority incorrectly assumes that because *Caldwell* is "dif-

ferent" from *Donnelly*, it must be an unpredictable "new law" evolution away from the root of *Donnelly*. See *Sawyer*, 881 F.2d at 1281, 1282, 1284, 1285. The source of this error may be found in the State's argument on the merits of this case in the En Banc proceedings before *Teague* was decided. The State there urged the Fifth Circuit to find that *Caldwell* was a direct descendant of *Donnelly*. It argued that *Donnelly*, *Caldwell*, and *Darden v. Wainwright* all prescribe the same standard for assessing *Caldwell* error—a standard which would allow uncorrected *Caldwell* violations to be held harmless as long as a defendant could not prove "prejudice" on the basis of the entire record. See, e.g., *Sawyer*, 881 F.2d at 1282, 1284, 1285 (describing State arguments); *Sawyer*, 848 F.2d 582, 599 n.15 (5th Cir. 1988) (panel opinion, upholding State view), *vacated in part by* 881 F.2d 1273 (5th Cir. 1989) (en banc).

Robert Sawyer's merits argument below, by contrast, observed that *Donnelly* and *Darden* reflect a distinctly different substantive doctrine than *Caldwell*. The *Caldwell* rule has three distinctive features. It establishes an Eighth Amendment ban on the particular subject of false and misleading argument about the non-finality of the jury's responsibility for death verdicts. This ban is based on "risk" analysis, and its formula holds that the risk of unreliable verdicts becomes unacceptable when *Caldwell* violations are based on focused, unambiguous and strong messages of a misleading nature that go uncorrected in express terms. Given the risk of prejudice in every case from an error of this particular kind, resentencing hearings must be granted because it cannot be said that the error had "no effect" on the verdict. See *Caldwell*, 472 U.S. at 323-326, 328-335, 337-341. By contrast, *Darden* and *Donnelly* contain no specific prohibitions; both cases simply hold that whenever improper prosecutorial argument of any ordinary kind occurs, it should not be cause for reversing a verdict unless the trial was thereby "infected" with unfairness in light of the entire record. See *Darden*, 477 U.S. at 181, *citing Donnelly*, 416 U.S. 637. See also *Darden*, 477 U.S. at 183-184 n.15 (noting that *Caldwell* doctrine is relevant only to *Caldwell* types of comment, not to claims of ordinary misconduct that are subject to *Darden-Donnelly* analysis). Indeed, the *Caldwell* Court expressly put *Donnelly* aside as inapplicable to *Caldwell* types

of comment concerning information about death sentencing procedures. See *Caldwell*, 472 U.S. at 337-341 & 340-341 n.7.

The Fifth Circuit majority did not confront the fact that the *Caldwell* Court itself rejected the applicability of *Donnelly* to the *Caldwell* issue. Instead the majority assumed that *Donnelly* is the starting point for *Caldwell* analysis. This is plainly wrong both historically and analytically.¹⁰ The Fifth Circuit dissenters had no trouble discerning that *Caldwell* does not derive from *Donnelly*. *Sawyer*, 881 F.2d at 1298-1299. State courts had no trouble discerning that *Donnelly* was inapposite to the *Caldwell* problem.

And once it is perceived that the Eighth Amendment precedents, not *Donnelly*, provide the template of relevant jurisprudence for assessing whether *Caldwell* is "old law" or "new law", the answer to that question becomes plain. As the Fifth Circuit dissenters determined, based on the Eighth Amendment precedents "it is difficult to imagine the Court reaching any other conclusion" than the *Caldwell* rule, whether at the time of *Caldwell*, or at the time Robert Sawyer's conviction became final. *Sawyer*, 881 F.2d at 1298 (King, J., dissenting).¹¹

¹⁰ The Fifth Circuit majority also recharacterizes Robert Sawyer's arguments under *Caldwell*, and makes them sound as though they embraced the Fifth Circuit's own flawed view of *Donnelly* as the starting point for *Caldwell* analysis. See, e.g., *Sawyer*, 881 F.2d at 1284, 1285, 1293 (Sawyer "argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*"; "we agree with Sawyer that *Caldwell* must be read in light of *McGautha*"; "as Sawyer contends, the *Donnelly* issue of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error"; "what Sawyer seeks to rely on is *Caldwell*'s modification of *Donnelly* in light of the ideals discussed in *McGautha*"). These recharacterized arguments are nowhere found in the briefs submitted by Robert Sawyer.

¹¹ Perhaps the Fifth Circuit majority misapprehended *Caldwell* by viewing it through lenses tinted by the experience of federal judges in applying *Donnelly* analysis on a regular basis. *Donnelly* claims are made with some frequency. See generally, Genson & Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It*

B. When *Caldwell* Rights Are Violated, The Likelihood Of An Accurate Death Sentence Is Seriously Diminished, And The Fundamental Fairness That Must Underlie A Death Verdict Is Undermined. Therefore, The *Caldwell* Rule Vindicates Rights That Enjoy A Special Exemption From The Non-Retroactivity Rule Of *Teague v. Lane*.

1. According To *Teague's* Policies And Guidelines For Identifying Bedrock Procedural Elements Of Fundamental Fairness, The *Caldwell* Rule Constitutes Such An Element, Because It Is Essential To Preserve The Accuracy And Fairness Of Capital Sentencing Judgments By Juries.

Caldwell should be applied retroactively to Robert Sawyer's case because *Caldwell* violations "undermine the fundamental fairness that must underlie" a death verdict and "seriously diminish the likelihood of obtaining an accurate" death verdict. *Teague*, 109 S.Ct. at 1077. See *Penry*, 109 S.Ct. at 2944 (-*Teague's* "fundamental fairness" exception to non-retroactivity rule applies in the capital sentencing context). According to *Teague* the concerns of finality and comity, which normally dictate non-retroactivity of new rules, must occasionally yield to the need for a complete guarantee of particular rights to all defendants. This Court should find that *Caldwell* falls within *Teague's* "fundamental fairness" exception because retroactive application of *Caldwell* would accord with the policies that appear to underlie that exception. In addition, *Caldwell* falls within the specific guidelines provided by *Teague* for identifying "bedrock procedural elements" of fundamental fairness.

First, there appear to be two policies that underlie *Teague's* exception to the non-retroactivity rule. The exception is justi-

Time to Start Prosecuting the Prosecutors?, 19 Loy. Chi. L.J. 39 (1987). True *Caldwell* violations, by contrast, are rare. See, e.g., *Wheat v. Thigpen*, 793 F.2d 621 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987) (the only grant of *Caldwell* relief to date in the Fifth Circuit). For other grants of *Caldwell* relief in the federal courts, see *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), cert. denied, ____ U.S. ____, 109 S. Ct. 1353 (1989); *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989); *Blanco v. Dugger*, 691 F. Supp. 308 (S.D. Fla. 1988).

fied by the fact that a new rule will occasionally reflect a new consensus of "judicial perceptions of what we can rightly demand of the adjudicatory process" in terms of fair procedures. *Teague*, 109 S.Ct. at 1076, quoting *Mackey*, 401 U.S. at 693-694 (separate opinion of Harlan, J.). Thus, after most states adopted the right to counsel for serious felonies, this Court considered it justifiable to impose the new rule on all the states as a Sixth Amendment requirement. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). Retroactive application of this new rule was justified as well, suggests Justice Harlan, because a strong consensus existed among the states that the rule was necessary for the operation of a fundamentally fair Anglo-American system of criminal justice. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 149-150 n.14 (1968).

A second *Teague* policy follows from this first one that supports retroactive application of rights that come to be regarded as fundamental by many states. When retroactive application of a new rule occurs, this special recognition of the rule will serve a state interest, namely the interest in federal ratification of a rule that most states regard as fundamental. Justice Harlan recognized the central role that states deserve to play in the development of rules of criminal procedure, and found it "intolerable" that the Supreme Court would "take to [itself] the sole ability to speak to" issues of constitutional law. *Mackey*, 401 U.S. at 680 (separate opinion of Harlan, J.) The retroactive application of a bedrock element that was foreshadowed as fundamental in state jurisprudence thus reaffirms the value of the states' views on fundamental rights.

It is plain that the retroactive application of *Caldwell* rights would serve the two policies behind *Teague's* recognition of the need for a "fundamental fairness" exception to its non-retroactivity rule. "*Caldwell*" rights for capital cases enjoyed broad support among the states for over 100 years before *Caldwell* was decided. See cases cited in note 4 *supra*, and note 13 *infra*. Many states also shared the judgment that *Caldwell* rights were needed in non-capital cases as well. See cases cited in note 13 *infra*. This Court's *Caldwell* decision was a ratification of a state consensus, based on the evolution of "judicial perceptions of what we can rightly demand" of the capital sentencing pro-

cess. The Fifth Circuit dissenters pointedly noted that the majority's refusal to apply *Caldwell* retroactively "devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms." *Sawyer*, 881 F.2d at 1302 (King, J., dissenting).¹²

Additionally, quite apart from *Teague*'s policies that support the "fundamental fairness" exception, the *Teague* opinion contains specific guidelines in the form of suggestions for identifying bedrock procedural elements of fundamental fairness in cases like Robert Sawyer's. First, *Teague* emphasizes the need for a rule to be accuracy-enhancing; second, the *Teague* Court assumes that the well-established lineage of a rule is relevant, as it states that bedrock procedures will be so "central" that "it [is] unlikely that many such components of basic due process have yet to emerge." *Teague*, 109 S. Ct. at 1077. Third, *Teague* provides a helpful citation of rights that already belong in the "bedrock" category, so that the *Caldwell* rule may be compared with those rights. The *Caldwell* rule ranks as fundamental under each one of these three implicit guidelines for selecting "fundamental fairness" rights.

First, the face of the *Caldwell* opinion makes plain that the *Caldwell* rule was dictated by a need to safeguard the "accuracy" of death verdicts. The opinion identifies four separate threats to the accuracy of verdicts arising from *Caldwell* violations. These threats include the danger that jurors will fail to make a proper assessment of mitigating evidence, and that they will use an advisory verdict symbolically to "send a message" of disapproval to the courts and the public. Two other threats are the danger that jurors will use a death verdict to transfer ultimate sentencing responsibility to the appellate courts, and that they will wish to defer to appellate judges as expert sentencers, in order to relieve their consciences of the

¹² The Fifth Circuit dissenters found that the state courts, like the Louisiana Court, adopted the *Caldwell* rule before *Caldwell* "to conform state law to perceived eighth amendment requirements," and found that it was irrelevant whether they were "conforming to an independent federal constitutional constraint articulated by the Supreme Court." *Sawyer*, 881 F.2d at 1301 (King, J., dissenting).

"awesome responsibility" of choosing between life and death. See *Caldwell*, 472 U.S. at 330-333. Bad *Caldwell* argument creates a "mistaken impression" about the jurors' role, "thereby creating an unacceptable risk that the death penalty [may have been] meted out arbitrarily or capriciously." *Id.* at 343 (O'Connor, J., concurring), cited in *Sawyer*, 881 F.2d at 1304 (King, J., dissenting).

Thus this Court's reasoning about the need for "reliable" death verdicts shapes the very substance of the *Caldwell* rule, and identifies it as a bedrock procedural requirement for fair death-sentencing hearings. Because *Caldwell* error gives rise to multiple serious threats to the reliability of a death verdict, the Court in *Caldwell* placed the burden on the State to show the harmlessness of any such error. *Caldwell* rights are worthy of "high esteem,"

for the Supreme Court found *Caldwell* error to be so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state had demonstrated otherwise.

Sawyer, 881 F.2d at 1304; compare *id.* at 1304-1305 & n.79-81 (contrasting *Caldwell* rights with other Eighth Amendment rights where prejudice is not assumed to exist solely on the basis of the substantive violation itself).

Second, the *Teague* opinion suggests that one earmark of bedrock elements of procedural fairness is an ancient lineage in the jurisprudence of criminal procedure. See *Teague*, 109 S. Ct. at 1077 ("we believe it unlikely that many [bedrock] components of basic due process have yet to emerge"). *Caldwell* rights enjoy such a lineage, as this Court noted in the *Caldwell* opinion. See *Caldwell*, 472 U.S. at 333-334 & nn. 4, 5. Many state courts before *Furman* created "*Caldwell*" rules to insure the reliability of sentencing hearings in capital trials, and some

states employed these rules in non-capital trials as well.¹³ In

¹³ For capital cases, see, e.g., *People v. Morse*, 60 Cal. 2d 631, 388 P.2d 33, 43-44, 36 Cal. Rptr. 201 (1964) (trial judge's instruction about his power to reduce a death sentence is condemned, reversal required, remarks weaken jury's sense of responsibility); *State v. Mount*, 30 N.J. 195, 152 A.2d 343, 352 (1959) (trial judge's remarks about appellate review condemned, reversal required, remarks weaken jury's sense of obligation in performance of its duties, and deprive the defendant of a fair determination on the issue of life or death); *Pait v. State*, 112 So.2d 381, 384 (Fla. 1959) (remarks condemned, reversal required, remarks suggest that jury can disregard its responsibility, and unreviewable nature of death verdict makes remarks especially prejudicial); *State v. Dockery*, 238 N.C. 222, 77 S.E.2d 664, 668 (1953) (remarks condemned, reversal required, remarks prejudiced the defendant's right to have the jury recommend life, and were calculated to induce the jury not to exercise its discretion to give a life sentence); *State v. Hawley*, 229 N.C. 167, 48 S.E.2d 35, 36 (1948) (remarks condemned, reversal required, remarks tend to disconcert the jury in fairly deliberating and arriving at a just verdict); *Pilley v. State*, 247 Ala. 523, 25 So.2d 57, 59 (Ala. 1946) (remarks are condemned, because they lessened juror's sense of responsibility, but no reversal required where judge gave immediate correction); *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465, 467 (N.Y. 1940) (remarks condemned, reversal required, remarks suggest jurors need not be greatly concerned about verdict); *State v. Biggerstaff*, 17 Mont. 510, 43 P. 709, 711 (1896) (remarks were reprehensible, and calculated to cause jurors to be less cautious in weighing evidence and less mindful of duties, and would be ground for reversal if issue were properly raised on appeal); *Vaughn v. State*, 24 S.W. 885, 889 (Ark. 1894) (remarks condemned, but no reversal where judge gave immediate correction); *State v. Kring*, 64 Mo. 591, 596 (Mo. App. 1877) (remarks condemned, reversal required, argument was calculated to induce the jury to disregard its responsibility for a death verdict, and even in the absence of an objection, the trial judge should have intervened to give prompt correction.)

For non-capital cases, see, e.g., *Borgen v. State*, 682 S.W.2d 620, 623-624 (Tex. App. 1984); *Howell v. State*, 411 So.2d 772, 774, 777 (Miss. 1982); *Simms v. State*, 492 P.2d 516, 523 (Wyo.), cert. denied, 409 U.S. 886 (1972); *Lyons v. Commonwealth*, 204 Va. 375, 131 S.E.2d 407, 409 (1963); *State v. Benjamin*, 309 S.W.2d 602, 605 (Mo. 1958); *Graham v. State*, 202 Tenn. 423, 304 S.W.2d 622, 624 (1957); *State v. Merryman*, 79 Ariz. 73, 283 P.2d 239, 241 (1955); *Gray v. State*, 191 Tenn. 526, 235 S.W.2d 20 (1950); *Commonwealth v. Balles*, 160 Pa. Super. 148, 50 A.2d 729 (1947); *Kelley v. State*, 210 Ind. 380, 3

capital cases, the tradition that produced *Caldwell* dates from at least 1877. See *State v. Kring*, 64 Mo. 591, 596 (Mo. App. 1877).

The policies of *Teague* are not offended by the retroactive application of bedrock rights of ancient lineage. No injury is done to state courts' expectations concerning the future development of the law when old, familiar rights developed by the state courts themselves are ratified in constitutional doctrine. Compare *Teague*, 109 S. Ct. at 1075 (describing the injury to state interests when federal courts retroactively apply unanticipated rights). A rule recognized for over 100 years and adopted in many states as essential to the integrity of the jury's sentencing function is manifestly rooted in common conceptions of fundamental fairness. These conceptions make its acceptance into federal constitutional doctrine an expression of the continuity of basic values, not their sudden change. *Caldwell* springs, in other words, from enduring rather than ephemeral judgments about what fundamental fairness demands.

Third, the *Teague* opinion provides examples of fundamental fairness rights that would command retroactive application. - *Teague*, 109 S. Ct. at 1077. One is the right against the knowing use of perjured testimony by a prosecutor. See *id.*, citing *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting), citing *Mooney v. Holohan*, 294 U.S. 103 (1935). *Mooney* was a death case in which this Court condemned the contrivance of

N.E.2d 65, 74 (1936); *Bryant v. State*, 205 Ind. 372, 186 N.E. 322, 325 (1933) (judicial instruction); *Crobaugh v. State*, 45 Ohio, App. 410, 187 N.E. 243, 246 (1932); *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308 (1931); *Davis v. State*, 200 Ind. 88, 161 N.E. 375, 383 (1928); *Taylor v. State*, 22 Ala. App. 428, 116 So. 415 (1928); *Osius v. State*, 96 Fla. 318, 117 So. 859, 861 (1928); *People v. Santini*, 221 App. Div. 139, 222 N.Y.S. 683, 686 (1927); *Plyler v. State*, 21 Ala. App. 320, 108 So. 83, 84 (1926); *Beard v. State*, 19 Ala. App. 102, 95 So. 333, 334 (1923); *Hammond v. State*, 156 Ga. 880, 120 S.E. 539, 541 (1923); *Murmurt v. State*, 67 S.W. 508, 510 (Tex. 1902); *Brazell v. State*, 33 Tex. Cr. R. 333, 26 S.W. 723, 724 (1894); *Crow v. State*, 33 Tex. Cr. R. 264, 26 S.W. 209, 212 (1894); *McDonald v. People*, 126 Ill. 150, 18 N.E. 817 (1888).

convictions through the "deliberate deception" of a jury "as inconsistent with the rudimentary demands of justice" *Mooney*, 294 U.S. at 112. *Id.*

Caldwell violations offend the Constitution in the same ways and for the same reasons as *Mooney* violations. They create a danger of actual unreliability in the jury's verdict, resting as it does on false and misleading information. They also create an appearance of impropriety that undermines the legitimacy of the jury's decision-making process. When Robert Sawyer's prosecutor falsely told his sentencing jury that it was "merely making a recommendation," this duplicity jeopardized both the jury's verdict as an accurate indicator of its sentencing judgment and the basic integrity of the sentencing process in Robert Sawyer's case.¹⁴

Rights like those established in *Mooney* and *Caldwell* are properly deemed to be implicit in the concept of ordered liberty because they establish procedures that are essential preconditions to confidence in the rectitude of the criminal justice system. See *Teague*, 109 S. Ct. at 1077. By contrast, the rule invoked in *Teague* was not based on the "premise that every criminal trial, or any particular trial, [is] necessarily unfair" because the rule was not obeyed. *Teague*, 109 S. Ct. at 1077 (quoting *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975)). *Caldwell* rights, however, are based upon precisely such a premise of unfairness, and should be viewed as rights whose violations "seriously diminish" the likely accuracy of a death verdict and "undermine the fundamental fairness that must underlie" such a verdict. *Teague*, 109 S. Ct. at 1077.

A final justification for including *Caldwell* in the category of decisions recognizing bedrock rights of fundamental fairness can be found in a central concept of pre-*Teague* retroactivity law that was carried forward in modified form by *Teague*. Prior

¹⁴ There can be no doubt that the prosecutor's repeated admonitions that the jury was "merely" making a "recommendation" were erroneous descriptions of the jury's obligation to issue a binding death verdict. See La. Code Crim. P., Art. 905.8 (1976) and La. Supreme Court Rule 28, set forth in Appendix A.

to *Teague* an important consideration bearing on the retroactivity of any constitutional decision was the extent to which the decision established a "constitutional principle[] designed to enhance the accuracy of criminal trials." *Solem*, 465 U.S. at 643. *Teague* embodies this concern in its reformulation of Justice Harlan's second exception to non-retroactivity, focusing on whether the likelihood of accuracy is seriously diminished by the violation of a particular procedural right. *Id.* at 1077. *Caldwell*'s crucial objective is to prevent the substantial risk that capital sentencing verdicts may inaccurately reflect the jury's actual determination of what punishment should be inflicted, when the jury has been given false and misleading information. Cf. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-152 (1970) (a case in which the "jury was subjected to improper influences by a court officer" exemplifies the violation of a right concerned with assuring accuracy).

The retroactive application of a constitutional rule of this sort does not subordinate any legitimate interest of the State to the Petitioner. Both the State and the Petitioner have an overriding interest in avoiding the risk of execution of a death sentence that the jury may not have intended to be carried out. As the Fifth Circuit dissenters observed:

We cannot agree that a state's interest in the finality of judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, execution of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

Sawyer, 881 F.2d at 1305 (King, J., dissenting). Accord, *Hopkinson v. Shillinger*, 888 F.2d 1286 (10th Cir. 1989) (en banc) (holding that *Caldwell* rights are bedrock rights under *Teague*).

2. The Fifth Circuit Majority Used Inapt Analysis To Determine *Caldwell*'s Status Under The Second Exception To *Teague*.

The Fifth Circuit majority analyzed the applicability of *Teague*'s "fundamental fairness" doctrine to *Caldwell* largely

by an exegesis of two cases that have nothing to do with the purposes of either. The first case is *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). As we have noted earlier in this brief, the Fifth Circuit misperceives *Donnelly* as the source of *Caldwell*, instead of recognizing that *Donnelly* and *Caldwell* are distinct doctrines based on distinctly different concerns. This misapprehension leads the Fifth Circuit majority to imagine that *Caldwell's* "no effect" ingredient was a "modification" of *Donnelly* and can be sliced off from the *Caldwell* doctrine for examination as the relevant "new rule" under *Teague*. *Sawyer*, 881 F.2d at 1292-1293. The awkwardness of such a formulation betrays the fallacy inherent in the majority's claim that *Caldwell* is rooted in *Donnelly*, for this "slice" fails to include all of *Caldwell's* distinctive ingredients, and thus scarcely represents that which distinguishes *Caldwell* from *Donnelly*. Even more awkwardly, the Fifth Circuit majority concludes that while the core rule represented by *Donnelly* may be fundamental under *Teague*, the increment of *Caldwell* over *Donnelly* is not. *Sawyer*, 881 F.2d at 1293.

This muddled claim is contradicted by the face of the *Caldwell* opinion.¹⁵ This Court explicitly described *Caldwell* violations as acts that, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Caldwell*, 472 U.S. at 340. Furthermore, the heightened scrutiny that *Caldwell* demands of certain kinds of prosecutorial arguments responds precisely to *Caldwell's* insight that this particular species of prosecutorial argument is peculiarly likely to jeopardize the fairness and accuracy of capital sentencing deliberations, not less likely to do so than other prosecutorial errors. This is true whether the demand for heightened scrutiny is incorrectly viewed as an increment over *Donnelly*, or correctly viewed as a separate

¹⁵ It is also contradicted by *Darden*. The only defendants who can receive relief under *Caldwell* are those whose claims satisfy the exacting *Caldwell* criteria, most importantly the requirement that false or misleading information about the non-finality of a death verdict has been communicated to the sentencer. *Darden*, 477 U.S. at 183-184 n.15.

legal doctrine rooted in concerns unique to the Eighth Amendment.

Rights that are "bedrock elements" under *Teague* can be identified only through consideration of *Teague's* policies supporting retroactive application of such rights. The Fifth Circuit majority does not explain how its exclusion of *Caldwell* from the bedrock category serves such policies. Nor does the majority consider the ways in which *Caldwell* qualifies for retroactive application under *Teague's* implicit guidelines. As the majority's decision to so exclude *Caldwell* was not based on *Teague's* reasoning, it should not be adopted by this Court.

The Fifth Circuit majority's second inapposite analysis consists of reasoning by analogy from the procedural default holding in *Dugger v. Adams* to a definition of "fundamental fairness" for the purpose of identifying bedrock *Teague* rights. See *Dugger*, ___ U.S. ___, 109 S. Ct. 1211, 1217-1218 & n.6 (1989). *Dugger* held that *Caldwell* violations do not automatically satisfy the requirement of showing a "fundamental miscarriage of justice" as the basis for relief from the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977). See *Dugger*, 109 S. Ct. at 1217 n.6. Instead, such showings must be made on a case-by-case basis, in accordance with this Court's prior *Sykes* doctrine.

The Fifth Circuit majority asks "why a *Caldwell* violation" should be "fundamental" under *Teague* but not under *Dugger*. *Sawyer*, 881 F.2d at 1293-1294. The answer is quite apparent once one avoids the trap of assuming that similar words necessarily carry the same doctrinal baggage. See M. Hancock, *Fallacy of the Transplanted Category*, 37 Can. B. Rev. 535 (1959). The use of a "fundamental fairness" test to demark *Teague's* second exception, and the use of a roughly similar formula in connection with the "miscarriage of justice" exception to *Sykes*, serve entirely different purposes and policies.

In the *Sykes* context, the inquiry is whether the kind and degree of harm suffered as a result of a constitutional violation that a habeas petitioner might have averted by timely objection are so cogent that they should be recognized as excusing his failure to make that objection. In the *Teague* context, the very

different inquiry is whether the kind and degree of harm threatened by conducting trial proceedings in disregard of a constitutional norm that is subsequently recognized as governing such proceedings are so cogent that the norm should be applied retroactively to persons who would otherwise be denied its benefit solely because of fortuities of timing for which they are not accountable. *Caldwell* satisfies *Teague*'s carefully considered guidelines for identifying such norms. It constitutionalizes a principle whose disregard undermines the integrity of the sentencing process that is necessary to assure the "fundamental fairness" of a death verdict and seriously diminishes the likelihood of obtaining verdicts which are accurate reflections of the jury's reasoned sentencing choice.

The Fifth Circuit dissenters were not trapped in the majority's mistake, as they recognized the need for *Teague*'s exception to be defined according to the policies that inspired the exception, not *Teague*'s non-retroactivity rule. With regard to Eighth Amendment sentencing phase rights, the dissenters aptly identified a state interest that complements and reinforces the *Teague* interests in retroactive application of bedrock elements in non-capital cases. They identified that interest as the dividend of public confidence that accrues to the states when bedrock rights are applied to the giving of life and death verdicts, in order to insure the reliability of death verdicts. See *Sawyer*, 881 F.2d at 1305 (King J., dissenting).

This Court should not follow the Fifth Circuit majority's approach to *Teague*'s "fundamental fairness" exception, because that approach does not seek to give effect to *Teague*'s policies or to follow *Teague*'s implicit guidelines for the determination of bedrock rights. Instead, this Court should adopt the Fifth Circuit dissent's approach, and hold that the *Caldwell* rule belongs in *Teague*'s small catalogue of rights that guarantee the "fundamental fairness" that must underlie a death verdict.

II. THE PROSECUTOR VIOLATED ROBERT SAWYER'S EIGHTH AMENDMENT RIGHTS UNDER *CALDWELL V. MISSISSIPPI* BY MAKING FALSE AND MISLEADING CLOSING ARGUMENTS WHICH SUGGESTED THAT THE JURY'S DEATH VERDICT WAS NOT FINAL. AS THESE ARGUMENTS WERE NEVER CORRECTED, A RESENTENCING HEARING MUST BE PROVIDED IN ORDER FOR A RELIABLE VERDICT TO BE OBTAINED.

A. The Prosecutor Violated Robert Sawyer's Eighth Amendment Rights Under *Caldwell* By Making False And Misleading Closing Arguments Which Suggested That The Jurors Were Not Making A Final Decision About The Death Penalty, And That An Erroneous Death Verdict Could Be Corrected By Reviewing Courts.

The Fifth Circuit dissenters found that the prosecutor's arguments in Robert Sawyer's case "fall squarely within *Caldwell*'s prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility," thereby violating the Eighth Amendment. *Sawyer*, 881 F.2d at 1296 (King, J., dissenting). They also note that, "Had the majority decided Sawyer's case on the basis of the Supreme Court's decisions in existence when Sawyer's case was argued and submitted to this court, the majority would have granted him a new sentencing hearing." *Id.* at 1305. This conclusion reflects the judgment that Robert Sawyer's prosecutor violated *Caldwell* because he communicated false and misleading messages clearly to the jurors, and led them to believe "that the responsibility for determining the appropriateness of a death sentence" rested not with the jury but elsewhere. *Caldwell*, 472 U.S. at 323.

Like the prosecutor in *Caldwell*, Robert Sawyer's prosecutor first emphasized in a variety of ways that the jury's sentence was both non-final, and reviewable by appellate courts. Second, the prosecutor went beyond the argument of the *Caldwell* prosecutor and told the jurors explicitly that an erroneous death verdict could be corrected by others. Finally, the false and misleading messages conveyed by the prosecutor here were more numerous than in *Caldwell*, and even more

calculated to achieve the effect of making jurors believe their death verdict was non-final. Thus, there are ample reasons for concluding that the *Caldwell* violation here was "focused, unambiguous, and strong," so that a resentencing hearing is required. *Caldwell*, 472 U.S. at 340.

It is clear that the jury's death verdict is binding under Louisiana law, and that the Louisiana Supreme Court has only limited powers to review death verdicts for constitutional error. See La. Code Crim. P., Art. 905.8 (1976) ("The court shall sentence the defendant in accordance" with the jury's verdict); La. Code Crim. P., Art. 905.9 (1976) ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive" under procedures as are necessary to satisfy "constitutional criteria"); La. Supreme Court Rule 28 (at Appendix A). It is also clear that the verdict form and jury instructions used in Robert Sawyer's trial were somewhat misleading regarding the jury's final responsibility for death, because they tracked the statutory language that referred to the jury's verdict as a "recommendation." See La. Code Crim. P., Art. 905.6, 905.7, 905.8 (at Appendix A), and J.A. 13-16, 19.¹⁶ The prosecutor decided to take advantage of the misleading statutory term for the jury's death verdict by telling the jurors repeatedly that they should accept the idea that their death verdict was, indeed, merely "a recommendation." J.A. 7, 13. In addition, the prosecutor used other similar language in four separate episodes of argument to emphasize the non-final nature of the jury's verdict.

In the first of four episodes focusing on non-finality, the prosecutor assured the jury twice that a death verdict would not be the same thing as a death sentence. First, he stated that "you yourself will not be sentencing Robert Sawyer to the electric chair," if you find the statutory factors for death, and then he said "what you are saying" by a death verdict is that you

¹⁶ The verdict form and jury instructions were changed in 1988, to reflect the change in the statutory term for the jury's death verdict, which is now called a "determination" not a "recommendation." See La. Code Crim. P., Arts. 905.6, 905.7, 905.8 (1988) (at Appendix A).

"are of the opinion" that "this is the type of crime that deserves that penalty." "It is merely a recommendation." J.A. 7. In the second episode focusing on non-finality, the prosecutor characterized a death verdict as a step that "could" lead to "prosecution" to the "fullest extent of the law," but nothing more. He stated that "you are the people that are going to take the initial step and only the initial step." "All you are saying" is "that you the people" will not tolerate the commission of the crime without the "impact of the law of Louisiana." "All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less." J.A. 8-9.

In the third and fourth episodes of bad argument, the prosecutor continued to focus on the non-finality of the jury's death verdict. First, he emphatically told the jurors that they should not feel responsible for an execution: "Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so." J.A. 9. Then, in the last episode, during his second closing, the prosecutor returned to his opening assurance that the jury's verdict was merely a recommendation, and by using the word "recommendation" four times in a misleading summation of his request for a finding of death:

Now is the time and I ask that you *recommend* because all you are doing is making a *recommendation*. I ask that you *recommend* to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you *recommend* the death penalty. (emphasis added)

J.A. 13.

Three of the prosecutor's four episodes of bad argument also included explicit references to reviewing courts, as he sought to impress the jurors with the idea that their non-final verdict would be presented to judges who would have the responsibility for making the final decision about death. In the first episode, the prosecutor told the jurors that they would be "saying" their "opinion" and "mere recommendation" of death "to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, [and] the Supreme

Court possibly of the United States." J.A. 7. In the second episode, the prosecutor told the jurors that they would be "saying" their death verdict, that Robert Sawyer "could be prosecuted," to "this court, to the people of this Parish, to this man, [and] to all the Judges that are going to review this case after this day." J.A. 8-9. In the last episode, the prosecutor reminded the jurors in closing that they would be making a mere recommendation to "this Court and to any other Court that reviews Robert Sawyer's case." J.A. 13.

Robert Sawyer's prosecutor committed a *Caldwell* violation that was more egregious than that of the *Caldwell* prosecutor, because he actually assured the jurors that their death verdict, if erroneous, would be corrected by others. In the third episode of argument, he said,

[I]f you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong. . .

J.A. 9. Even the *Caldwell* dissent suggested that it would be unconstitutional to go beyond statements about non-finality and reviewability and actually tell the jurors that an erroneous death verdict could be corrected. *See Caldwell*, 472 U.S. at 348 (Rehnquist, J., dissenting) (if the prosecutor argues that "the appellate court would correct any 'mistake' the jury might make in choice of sentence" this probably would not comport with "some constitutional norm"). *Cf. id.* at 325-326 (where argument that the death verdict was "not the final decision" and "automatically reviewable" was sufficient to be held unconstitutional by the *Caldwell* majority).

Robert Sawyer's prosecutor's argument was worse than the argument in *Caldwell* because his prosecutor went beyond making statements about appellate review that were technically correct but misleading to lay jurors. Robert Sawyer's prosecutor repeatedly characterized the jury's death verdict in ways that were legally false, stating that it was only an opinion, an initial step, a determination of potential prosecution, and "merely" a recommendation. In *Caldwell*, by contrast, it was true that the jury's verdict was "automatically reviewable," but the prosecutor failed to explain that it was reviewable only for

legal errors, and was "not final" only because appeals concerning legal errors were likely to occur. Thus, the argument was false and misleading to lay jurors, who would readily assume that the prosecutor's argument implied that their death verdict could be reviewed for factual error by appellate courts. *See Caldwell*, 472 U.S. at 330-333 (emphasizing lay juror's likely understanding of misleading references to appellate review and non-finality of a jury's sentence); *id.* at 342-343 (O'Connor, J., concurring) (emphasizing same). Robert Sawyer's prosecutor's argument is even more unconstitutionally false and misleading than the *Caldwell* argument.

For this reason, Judge King found a *Caldwell* violation to exist in this case, as she stated:

It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecutor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous, and strong." [citing *Caldwell*] The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind them" would be there to correct any error in that determination. The message of non-finality is clear.

Sawyer, 848 F.2d at 605 (King, J., dissenting from the panel opinion).

Other courts have found *Caldwell* violations where arguments contained fewer false and misleading messages than the argument here. One state court reversed a death verdict where a prosecutor argued that the defendant would get "appeal after appeal after appeal," that the Supreme Court wouldn't "let anybody get executed until they're absolutely sure that that man has a fair trial," and that the switch wouldn't be "pulled in a matter of hours" because "[i]t goes on and on and on." *Commonwealth v. Baker*, 511 A.2d 777, 787 (Pa. 1986). The Louisiana Supreme Court reversed a death verdict where the prosecutor gave a lengthy description of the state supreme court's powers to review a death verdict under Louisiana Supreme Court Rule 28. *State v. Clark*, 492 So.2d 862, 871 (La. 1986). As the *Clark* Court concluded, no purpose is served by a

description of "various grounds for reversal on appeal, however infrequently invoked by this court, except to suggest that [the jury's verdict] can be disregarded for numerous reasons." *Id.*¹⁷

As the *Caldwell* violation in Robert Sawyer's case was communicated to the jury in clear terms, a resentencing hearing must be granted unless the violation was corrected in clear terms as well. As in *Caldwell*, there is nothing in the trial judge's instructions that would provide such correction, because the only references to jury responsibility are the boilerplate sorts of remarks that this Court held insufficient to correct the *Caldwell* violation in *Caldwell* itself.

B. The *Caldwell* Violations Committed By Robert Sawyer's Prosecutor Were Not Corrected Or Retracted At Trial, And Therefore A Resentencing Hearing Must Be Granted.

Like the *Caldwell* prosecutor, Robert Sawyer's prosecutor never retracted his false and misleading remarks about the non-finality of the jury's death verdict. Nor did the trial judge in this case either correct the remarks when they were made, or make any later reference in jury instructions to their false and misleading content. Therefore, this Court's standard for correction of a *Caldwell* violation has not been met. *See Caldwell*, 472 U.S. at 339-340, 340-341 n.7; *id.* at 343 (O'Connor, J., concurring).

The *Caldwell* opinion makes it clear that "correction" for a *Caldwell* error cannot be provided by statements about the jury's responsibility that do not retract or undermine the erroneous assertion that a death verdict "would be reviewed by

¹⁷ Courts also have reversed death verdicts where a *Caldwell* violation in the prosecutor's closing argument was aggravated by misleading jury instructions and verdict forms that did not inform the jurors sufficiently of the finality of their death verdict. *See, e.g., People v. Drake*, 748 P.2d 1237, 1258-1259 (Colo. 1988); *People v. Milner*, 45 Cal. 3d 227, 252-255, 753 P.2d 669, 686-689, 246 Cal. Rptr. 713, 7300-733 (1988). The *Caldwell* violation in Robert Sawyer's case was likewise made more damaging because of the confusing use of the term "recommendation" in the verdict form and the instructions given to the jury.

the appellate court to determine its correctness." *Id.* at 340-341 n.7. Or, as Justice O'Connor put it, correcting statements must "correct the impression that the appellate Court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate." *Id.* at 343 (O'Connor, J., concurring). Thus, prosecutorial comments stating that it is solely the jury's "job" to "decide the facts," or that "you're in the Jury Box to determine the punishment," will not provide a correction of error. Neither will a judge's instruction that the jury "must now decide whether the Defendant will be sentenced to death or to life imprisonment." These particular boilerplate statements were made in *Caldwell*, and were found to provide no correction of the false and misleading arguments there. *See Caldwell*, 472 U.S. at 346, 344 (Rehnquist, J., dissenting); *id.* (noting that the jurors were told to apply "the rules of law charged by the judge" and that statements made by counsel were not evidence, which boilerplate remarks were also disregarded by the *Caldwell* majority).¹⁸

Therefore, in Robert Sawyer's case, no correction for the *Caldwell* violation can be provided by isolated remarks by the prosecutor such as, "The decision is in your hands," or "It's all your doing." J.A. 8, 9. Nor was correction supplied by the boilerplate instructions of the trial judge, who made general references to the jury's "responsibility" to choose between life and death, but never explained that the correctness of a choice of death was not reviewable by appellate courts.¹⁹ Lower

¹⁸ Thus the Fifth Circuit majority erred when it noted that a court may "mitigate[] the effect of [a *Caldwell* violation] by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence." *Sawyer*, 881 F.2d at 1287. According to *Caldwell*, these boilerplate remarks should not be taken into account in assessing the existence of a constitutional violation.

¹⁹ After the closing arguments, the trial judge made three such comments, instructing the jurors that they "must now determine whether" Robert Sawyer "should be sentenced to death or to life imprisonment," that it was their duty to consider his character and the circumstances of the crime "to determine which sentence should be imposed," and finally, that it was their responsibility "in accor-

courts have required that, at a minimum, a trial judge should immediately intervene and instruct the jury to disregard a prosecutor's *Caldwell* violation after it occurs. See, e.g. *Jones v. Butler*, 864 F.2d 348, 360-361 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 2090 (1989); *Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), *cert. denied*, 484 U.S. 933 (1987). As Judge King found,

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument.

Sawyer, 848 F.2d at 605-606 (King, J., dissenting from the panel opinion). Thus, no correction under *Caldwell*'s standards can be found in Robert Sawyer's case.

Robert Sawyer's sentencing jury was never disabused of the notion that final responsibility for a death verdict might lie elsewhere. Therefore, *Caldwell* requires that a resentencing hearing be granted, because this Court must conclude, in light of the serious nature of the violation, that the *Caldwell* taint had a damaging effect on the jury. Once it is plain that Robert

dance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment [sic]." J.A. 13-14, 14, 16. None of these statements "correct the impression that the appellate court would be free to reverse the death sentence" if it were erroneous. *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring). The jurors would not find it inconsistent to be told that they were supposed to make a choice between life and death, and that, as they were told earlier by the prosecutor, if they chose death that choice would be reviewable on appeal.

While it is true that the trial judge told the jurors, at the outset of the sentencing hearing, that they had the authority to make "a binding recommendation to the trial judge," this statement preceded the prosecutor's closing arguments where he repeatedly argued that their recommendation was non-final and would be reviewed for correctness by others. J.A. 5. This instruction could not supply a correction before the *Caldwell* violation occurred, and no express message contradicting the prosecutor's false and misleading characterization of the jurors' "recommendation" was provided by the judge following his argument.

Sawyer's prosecutor committed a *Caldwell* violation that was clear and unambiguous, and that the violation was not corrected according to *Caldwell*'s standard, then a resentencing hearing is needed. The risk of prejudice and unreliability from his prosecutor's damaging argument is so great that it cannot be said that the argument here had "no effect" on the jury. *Caldwell*, 472 U.S. at 341. Accord, *Sawyer*, 891 F.2d at 1284-1285 (affirming the appropriateness of *Caldwell*'s "no effect" test as an expression of the risk of prejudice that occurs in every case with *Caldwell* violations). See also *Campbell v. Kincheloe*, 829 F.2d 1453, 1460-1461 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 380 (1988); *Mann v. Dugger*, 844 F.2d 1446, 1457-1458 (11th Cir. 1988) (*en banc*), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1353 (1989). But see *Hopkinson v. Shillinger*, 888 F.2d 1286, 1293-1295 (10th Cir. 1989) (*en banc*) (erroneously rejecting the "no effect" formula and replacing it with a "substantial possibility" of prejudice formula).

Robert Sawyer's case deserves constitutional relief, and his case is a rare one, as can be seen from the small number of federal and state cases where resentencing hearings have been granted because of a *Caldwell* violation. Not many prosecutors are tempted deliberately to commit errors such as *Caldwell* violations. But occasionally prosecutors will commit reversible misconduct in closing arguments, even in cases they expect to win. See Jonakait, *The Ethical Prosecutor's Misconduct*, 23 Crim. L. Bull. 550 (1987). True *Caldwell* violations must be condemned when they occur, because they pose a unique threat to the reliability and legitimacy of death verdicts. The Fifth Circuit majority declined to grant Robert Sawyer a resentencing hearing, because it believed that *Caldwell* could not be applied retroactively to his case. In fact, *Caldwell* should be applied because it fits well within this Court's *Penry* and *Teague* definitions of old law, and within *Teague*'s definition of a decision that vindicates rights of fundamental fairness.

The Fifth Circuit's decision should be reversed, and Robert Sawyer should be given a resentencing hearing, so that the decision whether he should die will be put to a jury that is not misled about its responsibilities.

CONCLUSION

Because the result reached by the Court of Appeals is in direct conflict with the applicable holdings of this Court regarding the retroactivity of constitutional decisions, and because the petitioner has a valid constitutional claim on the merits, the judgment below should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus with regard to the provision of a resentencing hearing.

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APPENDIX

APPENDIX A

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694 § 1.

Art. 905.7 Form of recommendations

The form of jury recommendation shall be as follows:

“Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____
Foreman”

or

“The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

/s/ _____
Foreman”

Added by Acts 1976, No. 694, § 1.

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court

by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

SUPREME COURT RULE 28

Rule 905.9.1 Capital sentence review (applicable to La. C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

- (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
- (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript. Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report: Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital

sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

- i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.
- ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.
- iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan 1978.

Art. 905.6 Jury; unanimous determination

A sentence of death shall be imposed only upon a unanimous determination of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall render a determination of a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Amended by Acts 1988, No. 779, § 1, eff. July 18, 1988.

Art. 905.7. Form of determination

The form of jury determination shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant should be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____
Foreman"

or

"The jury unanimously determines that the defendant should be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

/s/ _____
Foreman"

Amended by Acts 1988, No. 779, § 1, eff. July 18, 1988.

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Amended by Acts 1988, No. 779, § 1, eff. July 18, 1988.

APPENDIX B

Citations To *Donnelly v. DeChristoforo* By
State Courts In The Pre-Caldwell Era

The state courts of twenty-seven states and the District of Columbia cited *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), in the period before this Court decided *Caldwell v. Mississippi*, 472 U.S. 320 (1985). A citation to *Donnelly* appeared in seventy-six capital and non-capital cases, which are listed below. In none of these cases did the court reject a "Caldwell" claim in the pre-Caldwell era on the basis of *Donnelly*.

SURVEY OF STATE COURTS CITING *DONNELLY*
CHRONOLOGICALLY ORDERED WITHIN EACH STATE.

Alabama

1. *Beecher v. State*, 294 Ala. 674, 681, 320 So.2d 727, 733 (1975).*
2. *Stokes v. State*, 462 So.2d 964, 968 (Ala. Crim. App. 1984).**

California

3. *People v. Duran*, 127 Cal. Rptr. 618, 627 n.15, 628, 545 P.2d 1322, 1331 n.15, 1332 (1976) (*en banc*).*

Colorado

4. *People v. Constant*, 645 P.2d 843, 847 (Colo.) (*en banc*), *cert. denied*, 459 U.S. 832 (1982).

Connecticut

5. *State v. Kinsey*, 173 Conn. 344, 348, 377 A.2d 1095, 1097-1098 (1977).

* For asterisk key see page 12a *infra*.

6. *State v. Daniels*, 180 Conn. 101, 111, 429 A.2d 813, 818-819 (1980).**
7. *State v. Glenn*, 194 Conn. 483, 495, 481 A.2d 741, 748 (1984).**

Delaware

8. *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).*,**
9. *Hughes v. State*, 437 A.2d 559, 568 (Del. 1981).*,**
10. *Bailey v. State*, 440 A.2d 997, 1003 (Del. 1982).*,**
11. *Burke v. State*, 484 A.2d 490, 498 (Del. 1984).

District of Columbia

12. *Villacres v. United States*, 357 A.2d 423, 428 n.6 (D.C. 1976).
13. *Williams v. United States*, 379 A.2d 698, 700 (D.C. 1977).
14. *Powell v. United States*, 458 A.2d 412, 413 (D.C. 1983).
15. *Fornah v. United States*, 460 A.2d 556, 559 (D.C. 1983).
16. *Jones v. United States*, 477 A.2d 231, 248 (D.C. 1984).
17. *Sherrod v. United States*, 478 A.2d 644, 657 (D.C. 1984).**
18. *Gates v. United States*, 481 A.2d 120, 127 (D.C. 1984), *cert. denied*, 470 U.S. 1058 (1985).**

Georgia

19. *Quaid v. State*, 132 Ga. App. 478, 483-484, 208 S.E.2d 336, 342 (1974).**
20. *Williams v. State*, 242 Ga. 757, 759, 251 S.E.2d 254, 256 (1978).*
21. *Finney v. State*, 253 Ga. 346, 348-349, 320 S.E.2d 147, 151 (1984), *cert. denied*, 470 U.S. 1088 (1985).*,**,***

Hawaii

22. *State v. Amarin*, 58 Haw. 623, 629, 574 P.2d 895, 899 (1978).**

Idaho

23. *Schwartzmiller v. Winters*, 99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978).
24. *State v. Hodges*, 105 Idaho 588, 595-596, 671 P.2d 1051, 1058-1059 (1983).**¹

Illinois

25. *People v. Harrington*, 22 Ill. App. 3d 938, 948, 317 N.E.2d 161, 168 (1974).

Indiana

26. *Richard v. State*, 299 Ind. 607, 612, 382 N.E.2d 899, 903 (1978), *cert. denied*, 440 U.S. 965 (1979).

Iowa

27. *State v. Johnson*, 219 N.W.2d 690, 698 (Iowa 1974).

Kentucky

28. *Elswick v. Commonwealth*, 574 S.W.2d 916, 920 (Ky. Ct. App. 1978).**
29. *Redd v. Commonwealth*, 591 S.W.2d 704, 707 (Ky. Ct. App. 1979).**
30. *White v. Commonwealth*, 611 S.W.2d 529, 531 (Ky. Ct. App. 1980), *cert. denied*, 452 U.S. 966 (1981).
31. *Nugent v. Commonwealth*, 639 S.W.2d 761, 765 (Ky. 1982).*,**

Maine

32. *State v. Gordon*, 321 A.2d 352, 364 (Me. 1974).

¹ *Donnelly* cited in dissent.

33. *State v. Hinds*, 485 A.2d 231, 238 (Me. 1984).**

Maryland

34. *Wilhelm v. State*, 272 Md. 404, 425-427, 437, 326 A.2d 707, 721-722, 733 (1974).*
35. *Blackwell v. State*, 278 Md. 466, 482, 365 A.2d 545, 554 (1976), *cert. denied*, 431 U.S. 918 (1977).²
36. *Stevenson v. State*, 299 Md. 297, 307, 473 A.2d 450, 455 (1984).*

Massachusetts

37. *Commonwealth v. Dunker*, 363 Mass. 792, 799, 298 N.E.2d 813, 818 (1973).**
38. *Commonwealth v. Stone*, 366 Mass. 508, 515, 320 N.E.2d 888, 894-895 (1974).*,**
39. *Commonwealth v. Coleman*, 366 Mass. 705, 714 n.1, 322 N.E.2d 407, 403 n.1 (1975).**
40. *Commonwealth v. Gilday*, 367 Mass. 474, 497, 327 N.E.2d 851, 864-865 (1975).*,**
41. *Commonwealth v. MacDonald*, 368 Mass. 395, 401, 333 N.E.2d 189, 193 (1975).*,*
42. *Commonwealth v. Killelea*, 370 Mass. 638, 648, 351 N.E.2d 509, 515 (1976).**
43. *Commonwealth v. King*, 4 Mass. App. 833, 351 N.E.2d 549, 551 (1976).**
44. *Commonwealth v. Gouveia*, 371 Mass. 566, 572, 358 N.E.2d 1001, 1005 (1976).**
45. *Commonwealth v. Shelley*, 371 Mass. 466, 471, 373 N.E.2d 951, 954 (1978).**

² *Donnelly* was cited as support for rejecting a claim of ordinary misconduct, and a "Caldwell" claim was separately rejected under a different analysis.

46. *Commonwealth v. Villalobos*, 7 Mass. App. 905, 388 N.E.2d 701, 703 (1979).**
47. *Commonwealth v. Hawley*, 380 Mass. 70, 89, N.E.2d 827, 839 (1980).**
48. *Commonwealth v. Hogan*, 428 N.E.2d 314, 318-319 (Mass. App. Ct. 1981), *cert. denied*, 440 N.E.2d 1173 (Mass. 1982).**
49. *Commonwealth v. Collins*, 386 Mass. 1, 14, 434 N.E.2d 964, 972 (1982).
50. *Commonwealth v. Francis*, 391 Mass. 369, 373, 461 N.E.2d 811, 814 (1984).**

Minnesota

51. *State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983).**

Missouri

52. *State v. Connell*, 523 S.W.2d 132, 137-138 (Mo. Ct. App. 1975).**
53. *State v. Rutledge*, 524 S.W.2d 449, 458 (Mo. Ct. App. 1975).**
54. *State v. Bailey*, 526 S.W.2d 40, 42 (Mo. Ct. App. 1975).**
55. *State v. Neal*, 526 S.W.2d 898, 902-903 (Mo. Ct. App. 1975).**
56. *State v. Lacy*, 548 S.W.2d 251, 252-253 (Mo. Ct. App. 1977).**
57. *State v. Wright*, 558 S.W.2d 321, 323 (Mo. Ct. App. 1977).**
58. *State v. Hoskins*, 569 S.W.2d 235, 236 (Mo. Ct. App. 1978).**

Nevada

59. *Allen v. State*, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975).
60. *State v. Hickman*, 204 N.J. Super. 409, 412-413, 499 A.2d 231, 233-234 (1975).**

New Mexico

61. *State v. White*, 101 N.M. 310, 681 P.2d 736, 740-741 (N.M. Ct. App. 1984), *cert. denied*, 101 N.M. 189, 679 P.2d 1287 (1984).**
62. *People v. Adams*, 107 App. Div. 2d 1040, 1041, 486 N.Y.S.2d 102, 103 (1985).**

Oklahoma

63. *McDonald v. State*, 553 P.2d 171, 176 (Okla. Crim. App. 1976).*

Pennsylvania

64. *Commonwealth v. Wiggins*, 231 Pa. Super 71, 74 n.2, 328 A.2d 520, 521 n.2 (1974).**
65. *Commonwealth v. Hamilton*, 460 Pa. 686, 698, 334 A.2d 588, 594 (1975).*,**
66. *Commonwealth v. Reynolds*, 254 Pa. Super. 454, 458 n.4, 386 A.2d 37, 39-40 n.4 (1978).
67. *Commonwealth v. Bullock*, 284 Pa. Super. 601, 610, 426 A.2d 657, 661 (1981).**

South Carolina

68. *Simmons v. State*, 264 S.C. 417, 437, 215 S.E.2d 883, 893 (1975).*,**3

Texas

69. *Johnson v. State*, 604 S.W.2d 128, 137 n.8 (Tex. Crim. App. 1980).*,**4
70. *Cannon v. State*, 668 S.W.2d 401, 407 n.6 (Tex. Crim. App. 1984) (*en banc*)**5

³ Dissent citing *Donnelly* dissent.

⁴ Dissent citing *Donnelly* in string cite for an irrelevant proposition.

⁵ Dissent citing *Donnelly* in string cite for an irrelevant proposition.

Utah

71. *Walker v. State*, 624 P.2d 687, 690 n.5, 691 n.13 (Utah 1981).**
72. *State v. Rebideau*, 132 Vt. 445, 449, 321 A.2d 58, 61 (1974).
73. *State v. Kasper*, 137 Vt. 184, 209, 404 A.2d 85, 99 (1979).**
74. *State v. Savo*, 141 Vt. 203, 213, 446 A.2d 786, 792 (1982).**
75. *State v. Foy*, 144 Vt. 109, 116, 475 A.2d 219, 224 (1984).**

Wyoming

76. *State ex rel. Hopkinson v. Teton*, 696 P.2d 54, 68 (Wyo.) cert. denied, 474 U.S. 865 (1985).*,**

*capital offense charged

**alleged error in closing argument

***sentencing phase

**STATES WHOSE STATE COURTS DID NOT CITE
DONNELLY IN THE PRE-CALDWELL ERA**

Alaska	North Carolina
Arizona	North Dakota
Arkansas	Ohio
Florida	Oregon
Kansas	Rhode Island
Louisiana	South Dakota
Michigan	Tennessee
Mississippi	Virginia
Montana	Washington
Nebraska	West Virginia
New Hampshire	Wisconsin

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No. 89-5809

Supreme Court, U.S.

FILED

APR 5 1990

JOSEPH F. SPANIOLO, JR.
CLERK

**In the
Supreme Court of the United States**

October Term, 1989

**Robert Sawyer,
Petitioner**

versus

**Larry Smith, Interim Warden,
Louisiana State Penitentiary,
Respondent**

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF OF THE RESPONDENT

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April, 1990

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QUESTIONS PRESENTED

- I. Whether the decision in Caldwell v. Mississippi, condemning false and misleading prosecutorial arguments to a capital jury concerning the jurors' sentencing responsibility, should be applied retroactively because Caldwell created a "new rule" under the standards of Teague v. Lane and Penry v. Lynaugh and because the Caldwell principle does not qualify under the two exceptions enunciated by the non-retroactivity rule of Teague v. Lane?
- II. Whether the prosecutor's remarks to Sawyer's capital sentencing jury were improper under Caldwell v. Mississippi such that Sawyer is entitled to a new sentencing hearing on the ground that his Eighth Amendment rights were violated?

PARTIES TO THE PROCEEDING

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT SAWYER,
PETITIONER
VERSUS

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder and sentenced to death on September 19, 1980. His conviction and sentence were affirmed by the Louisiana Supreme Court. See State v. Sawyer, 422 So.2d 95 (La. 1982), reh. denied Nov. 24, 1982. Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862 (1983). See Sawyer v. Louisiana, 463 U.S. 1223 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence addressing only the issues relative to Zant. See Sawyer v. State, 442 So.2d 1136 (La. 1983). J.A. 57. A second

application for certiorari to the United States Supreme Court was denied. See Sawyer v. Louisiana, 466 U.S. 931 (1984). Petitioner filed an application for state habeas relief on May 8, 1984, which was denied that day. J.A. 72.

Thereafter, the Louisiana Supreme Court remanded the case for an evidentiary hearing in the trial court. J.A. 73. The matter was submitted on the trial record and affidavits after which the trial court denied the application with written reasons. J.A. 74-86. Again, the Louisiana Supreme Court remanded for an evidentiary hearing which was held on July 25, 1985. The trial court denied the application again giving oral reasons. J.A. 88-92. Relief was further denied by the Louisiana Supreme Court. See Sawyer v. Maggio, 479 So.2d 360, reconsideration denied, 480 So.2d 313 (La. 1985). Lastly, Petitioner applied for federal habeas relief which was denied in an unpublished opinion. J.A. 94-153. Petitioner was then granted a certificate of probable cause and a stay of execution while he appealed to the United States Court of Appeals for the Fifth Circuit which denied his petition on June 30, 1988. See Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). J.A. 54. An en banc rehearing was granted on August 25, 1988. After oral argument, the en banc court requested supplemental briefing on three questions concerning this Court's decision in Teague v. Lane. J.A. 212. The En Banc Court issued an opinion on August 15, 1989: a 9-5 decision affirming the district court's dismissal of Sawyer's Writ. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), cert. granted ____ U.S. ____, 110 S.Ct. 835 (1990), vacating in part, Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). J.A. 214. This Court granted certiorari on January 16, 1990. J.A. 290.

STATEMENT OF THE FACTS

The following statement of facts is essentially as found in State v. Sawyer, 422 So.2d at 97, 98 (La. 1982) and the trial transcript.

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood, in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath because nobody wanted to look [at] her "funky whory ass" that way. When she resisted, defendant kicked her in the back of the head with his shoes which had taps on the ends. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water (defendant actually left the bathroom to boil the water while Lane kept a watch over Arwood, a period during which he may have raped her). When defendant returned to the bathroom, detergent and the boiling water were poured on Ms. Arwood followed by additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant kicking her in the chest, with both of his feet while letting out a yell, causing her head to strike either the tub or the adjacent window sill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. While on the floor, defendant walked on her back and Lane kicked her in the ribs. Defendant then beat her with a belt as she lay on the floor. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body

(particularly on her torso and genital area) and had set the lighter fluid afire. Lane told Shano, as he and Sawyer laughed about it, that his penis had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. Shano then heard Sawyer tell Lane, "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get."

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

SUMMARY OF ARGUMENT

The Court of Appeal's majority correctly held that Caldwell v. Mississippi is a "new rule" because it was not dictated by this Court's precedent under the standards of Teague v. Lane and Penry v. Lynaugh. The rule in Caldwell "was not dictated by precedent existing at the time the defendant's conviction became final" as restated by this Court in Butler v. McKellar and Saffle v. Parks. The federal cases

prior to Caldwell set standards for the imposition of the death penalty to ensure that it would not be imposed in an arbitrary and capricious manner. However, the particular actions that would be condemned or promoted under an Eighth Amendment analysis were not articulated except on a case by case basis. The federal case law at the time that Sawyer's conviction became final would not have predicted the particular circumstances and actions which Caldwell condemned.

In determining whether or not Caldwell issued a "new rule" under Teague and Penry, it is of no consequence that the Louisiana Supreme Court recognized Caldwell-type violations before 1985, because the Louisiana Supreme Court rested its decisions prior to 1985 on state law and court rules which required it to review a sentencing phase for passion, prejudice and arbitrary factors. There is no substantial reason for this Court to overrule its prior decisions that the availability of a state law claim does not establish a claim under the United States Constitution.

The Fifth Circuit's opinion below should be affirmed as well as its reasoning which established a one step "no-effect" test analysis for a Caldwell issue. In the process of deciding whether or not there is a Caldwell violation, the inquiry should focus on all the facts and circumstances, including the entire trial record. Thus, in the process of determining the existence of a Caldwell error, the Fifth Circuit uses all the ingredients of the Donnelly fundamental fairness analysis. The conclusion that if a Caldwell violation exists then the reviewing court can not say that it had no effect on the jury is a "new rule" of federal constitutional law which would preclude Sawyer from applying it to the facts of his case. In the alternative, if this Court decides that Caldwell merely applied the fundamental fairness analysis of Donnelly to the sentencing phase of a capital trial that application gave a death penalty sentencing hearing a heightened sense of reliability over other sentencing hearings. This heightened sense of reliability for a sentencing hearing is a "new rule" under the Teague and Penry analyses

such that Sawyer would still be precluded from benefitting from the effect of Caldwell.

The Caldwell principle as a "new rule" cannot be applied retroactively under either of the two exceptions enunciated by Teague. Caldwell does not fit under the second exception. The Caldwell rule is a prophylactic rule which is designed to lessen the possibility that the jurors' rested their decision elsewhere. Since it diminishes the risk of unreliability, it is not a "watershed rule" but an enhancement rule, and Sawyer is precluded from relying on the second exception enunciated in Teague.

Robert Sawyer is not entitled to a new sentencing hearing under Caldwell v. Mississippi since Sawyer's death penalty was not imposed by a jury which had been improperly led to believe that the responsibility for determining the appropriateness of death rests elsewhere. Improper argument alone is not a Caldwell violation. The inquiry, under this Court's jurisprudence, must be conducted on the entire record. The record, in this case, includes: (1) individual voir dire where each juror was explicitly told that, if a verdict of first degree murder was returned, the jury would have to decide the sentence which would be either life imprisonment or the death penalty; (2) instructions to the jury that the attorneys' arguments were not evidence; (3) argument by counsel that it would have to decide on what penalty would be imposed; and (4) instructions by the trial court to the jury that it had to decide on the penalty to be imposed.

The alleged violation is subject to a "fundamental fairness" standard of review as set forth in Donnelly v. DeChristoforo, expanded in Darden v. Wainwright and used in Sawyer v. Butler by the en banc court in its analysis. However, should this Court find Caldwell error, the sentence need not be vacated after a harmless error analysis based on previous capital cases: on this record it can be said beyond a

reasonable doubt that the alleged Caldwell comments did not contribute to the sentence chosen by the unanimous jury.

ARGUMENT

I.

THE PRINCIPLE ANNOUNCED IN CALDWELL V. MISSISSIPPI IS A "NEW RULE" OF FEDERAL CONSTITUTIONAL LAW UNDER TEAGUE V. LANE AND CANNOT BE APPLIED TO ROBERT SAWYER ON COLLATERAL REVIEW SINCE IT DOES NOT COME WITHIN THE TWO NARROW EXCEPTIONS ESTABLISHED BY TEAGUE.

A. The Caldwell principle is a "new rule" since it imposes a new obligation under federal constitutional law that was not foreshadowed by precedent.

Robert Sawyer is before this Court on collateral review by a writ of habeas corpus alleging improper prosecutorial comments at the penalty phase of his capital trial in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Before addressing the merits of Sawyer's claim, it must first be determined whether the relief sought would create a "new rule" under this Court's holdings in Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060 (1989) and Penry v. Lynaugh, 489 U.S. ___, 109 S.Ct. 2934 (1989), as further explained in Dugger v. Adams, 489 U.S. ___, 109 S.Ct. 1211 (1989), Saffle v. Parks, ___ U.S. ___, S.Ct. No. 88-1264, decided March 5, 1990, and Butler v. McKellar, ___ U.S. ___, S.Ct. No. 88-6677, decided March 5, 1990. Under the dictates of these cases, if the Caldwell rule is a new rule it will not be applied to the Petitioner on collateral review unless it would fall into one of two narrow exceptions. Saffle v. Parks, supra, slip op., at 3. A new rule, as defined in Teague and Penry and refined in Saffle and Butler v. McKellar, is a rule that "breaks new

ground," "imposes a new obligation on the state or the federal government," or was not "dictated by precedent existing at the time that the defendant's conviction became final." Teague, supra, at ___; Penry, supra, at ___. This Court restated the definition of a new rule in Butler v. McKellar, supra, slip op. at 5, as a decision that announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."

The Caldwell decision condemns misleading prosecutorial arguments which diminish the jury's sense of responsibility for imposing the death penalty. Since the Caldwell decision does not overrule an earlier holding it does not obviously "break new ground" or "impose a new obligation" that would, if it did, clearly qualify it as a "new rule". It is then necessary to analyze the rule issued in Caldwell under the guidelines of Teague and Penry as reiterated in Butler and Saffle to determine if, in fact, Caldwell issued a new rule of law which would be inapplicable to Sawyer in this case since his conviction on direct appeal was final at least in 1984, if not 1983.

This Court has expressed an interest in maintaining state court convictions in the interest of "leaving concluded litigation in a state of repose." See, Teague, supra at ___; Butler, supra at ___, slip op. at 5. In order to avoid re-adjudicating convictions according to all legal standards in effect when a habeas petition is filed this Court has further determined that it is a better policy, in general, to apply the law prevailing at the time a conviction became final than it is to seek to dispose of habeas cases on the basis of intervening changes in constitutional interpretation. See Teague, supra, at ___. Applying later changes in constitutional interpretations to state cases on federal habeas as a deterrence to state courts would require state judges to "second guess" future federal interpretations. Such guessing would develop a chaotic state jurisprudence. Furthermore, the burden on the system to retry old cases as a result of carte blanche retroactive application of

recent constitutional interpretations would undermine the integrity of state convictions, which should be maintained in the interest of comity. Unless there is a colorable showing of factual innocence, the burden placed on society and the state by retrying old cases justifies the effects of the non-retroactivity of Teague and Penry. Habeas serves a function of deterrence on state courts to apply federal constitutional rules in place at the time of the conviction. In order to perform this deterrence function, it is necessary to apply the federal constitutional standards in place at the time that that conviction became final. Thus, on collateral review, the "new rule" principle validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. Butler, supra, slip op. at 6. This more than adequately ensures the integrity of state court rulings relative to federal constitutional principles.

In order to determine whether or not Caldwell issued a "new rule" it is necessary to consider whether this Eighth Amendment violation was foreshadowed by prior federal cases despite state court decisions which reflected some of the precepts of the Caldwell rule before Caldwell was decided in 1985. This analysis must also consider the interpretation and meaning of Caldwell and the standard of review referred to in that decision.

1. *The Caldwell principle is a "new rule" since it was not foreshadowed by prior federal cases.*

In Caldwell v. Mississippi, 472 U.S. 320, 329 (1985), Justice Marshall, speaking for the Court, concluded that "it is constitutionally impermissibly to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The Caldwell court, in further narrowing the general rule it announced, said that improper, inaccurate or misleading

remarks by the prosecutor, if left uncorrected, could diminish the jury's sense of responsibility in violation of the Eighth Amendment. This particular rule was in no way foreshadowed by the prior federal cases on the death penalty which placed limits on the imposition of capital punishment as rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. See e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

A review of the capital sentencing limitations imposed by this Court since Furman v. Georgia, 408 U.S. 238 (1972), reflects that this Court was initially concerned with the procedures by which the state imposed the death sentence as opposed to the substantive factors laid before the jury as a basis for imposing death. The directive from this Court in Furman was that, because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. In 1976, the Supreme Court reviewed the capital sentencing scheme of five states to determine whether those schemes had cured the constitutional defects identified in Furman.¹ The procedural safeguards as dictated by this Court were to direct and limit the jury's discretion so as to minimize the risk of wholly arbitrary and capricious action. Substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate were delineated in cases decided since 1976, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430

¹Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 328 (1976).

U.S. 349 (1977); California v. Ramos, 463 U.S. 992 (1983). Contrary to Sawyer's assertion, these cases determined rules for capital sentencing which did not predict the Caldwell rule.

The federal cases prior to Caldwell clearly held that the Eighth Amendment required a heightened level of reliability in the sentencing decision. The particular actions that would be condemned under an Eighth Amendment analysis were not articulated except on a case by case method. The Caldwell determination that diminishing a jury's sense of responsibility violated the Eighth Amendment was a particular limit imposed by this Court in 1985, that had not been delineated by prior cases. In fact, a reference to of appellate review could have been interpreted by a state court to be appropriate under the Eighth Amendment considerations after California v. Ramos, supra, was decided in 1983.

In Ramos, this Court concluded that there was no constitutional defect in the instructions regarding the governor's power to commute a sentence of life without possibility of parole under the Eighth and Fourteenth Amendments. In reaching its conclusion this Court noted that once a defendant falls within the legislatively defined category of persons eligible for the death penalty the jury is free to consider a myriad of factors to determine whether death is the appropriate punishment. Although the jury's choice between life and death must be individualized, the constitution does not require the jury to ignore other possible factors in the process of selecting those defendants who will actually be sentenced to death. See e.g. Zant v. Stephens, 462 U.S. 862, 878 (1983) and California v. Ramos, supra, at 1008. In short, despite the lower court's condemnation of the instructions regarding the governor's powers, this Court approved of those instructions as being a "substantive factor to be presented for the sentencing jury's consideration." Ramos, supra, at 1013.

The rule issued in Caldwell as a factor that might lead to arbitrary and capricious sentencing patterns condemned in

Furman was not specifically foreshadowed. Therefore, it represented a new rule of law when announced in Caldwell v. Mississippi. Furthermore, the more specific application of this principle in reference to particular prosecutorial statements which refer to appellate review, was also not foreshadowed by prior federal cases. In fact, the decision in Ramos could have led a state to believe that appropriate reference to appellate review would contribute to a reasoned decision by the jury in a death penalty phase of a trial. Since states that allow imposition of the death penalty have mandatory appellate review of those decisions, references to appellate review could be an accurate statement of the law, although if not fully explained it could be misleading. These possible fluctuations in interpretations, on retrospect, form another basis to maintain a non-retroactivity policy and also to conclude that Caldwell is a "new rule".

The state's position that Caldwell issued a "new rule" of law is further supported by this Court's most recent decisions in Saffle v. Parks, ___ U.S. ___, S.Ct. No. 88-1264, decided March 5, 1990, and Butler v. McKellar, ___ U.S. ___, S.Ct. No. 88-6677, decided March 5, 1990. In Saffle the petitioner urged that an instruction delivered in the penalty phase of the trial, telling the jury to avoid any influence of sympathy, violated the Eighth Amendment under Teague and Penry. In reaching its decision that petitioner urged a "new rule" of law, this Court considered Lockett v. Ohio,² supra, and Eddings v. Oklahoma,³ supra, determining that neither spoke directly, if at

²The plurality in Lockett decided that an Ohio death penalty statute that limited the jury's consideration to specified mitigating circumstances violated the constitutional requirement of individualized sentencing in capital cases.

³Eddings determined that a sentencing judge's refusal, as a matter of law, to consider mitigating evidence presented by a capital defendant concerning his family history and upbringing was

all, to the issue presented here since Parks was asking the court to create a rule relating, not to what mitigating evidence the jury must be permitted to consider, but to how it must consider the mitigating evidence. Furthermore, the court refused to find assistance in California v. Brown, 479 U.S. 538 (1987),⁴ since a reasonable juror would interpret the instruction to ignore mere sympathy "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence." It was not unconstitutional for a state to expect a reasoned moral response and prohibit juries from basing their decisions on factors not presented at the trial. Saffle, 489 U.S. at ____, slip op. at 9.

In further explaining the definition of a "new rule" this Court, in Butler, declared that the rule of Arizona v. Roberson, 486 U.S. 675 (1988), is a "new rule" of law since its result was not dictated by precedent existing at the time defendant's conviction became final. It rejected the argument that Edwards v. Arizona, 451 U.S. 477 (1981), dictated the result in Roberson since Roberson would be merely an extension of the prophylactic rule in Edwards which requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel. The rule in Roberson which extended the Edwards rule to the context of a separate investigation is a new rule of law and not applicable to Butler on collateral review. By analogy, the rule in Caldwell which is a specific application of the rule that capital sentencing schemes need a heightened sense of reliability was not predicted by prior federal cases.

constitutional error.

⁴It was held that an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings," during the sentencing phase did not violate the Eighth Amendment.

Since this Court, in reaching its conclusions in Butler and Saffle, relied heavily on the law prevailing at the time that the petitioner's conviction became final, it is relevant here to consider what federal law was in effect at the time that Sawyer's conviction became final. Sawyer's writ for certiorari was remanded for further consideration in light of Zant v. Stephens, supra, by United States Supreme Court from direct appeal on July 6, 1983.⁵ The federal cases decided by this date did not predict the outcome of Caldwell. In 1985, there was language which addressed the discretion of the jury and limited its role to prevent the arbitrary and capricious imposition of the death penalty. However, there was no directive that foreshadowed the "new rule" of Caldwell.

As Justice Brennan said in his dissent in Butler, in regard to adjudicating in reference to prevailing law at the time of the conviction, "rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breath of their application. A judge must thereby discern whether the principles applied to specific patterns in prior cases fairly extend to govern analogous factual patterns." Butler v. McKellar, supra, slip op. at 7 of dissent. In reviewing Sawyer's claims under the prevailing law at the time that his conviction became final, it is clear that the principles regarding a death penalty hearing at that time, when applied to his specific facts, did not predict the outcome of Caldwell. At that time, the state court knew that the jury's discretion could not

⁵ Petitioner argues that his appeal was final for Teague-Perry purposes on April 2, 1984. But that date is when the United States Supreme Court denied certiorari relative to the Zant v. Stephens analysis. Sawyer's appeal was final for all other issues when this Court remanded his case to the Louisiana Supreme Court on July 6, 1983, for review under Zant. At this time review of other issues ceased and further review continued relative to Zant. The precedent existing at the time Sawyer's conviction became final would be cases existing prior to July 6, 1983.

be unbridled; that the jury's discretion could be limited by aggravating circumstances; that the jury's consideration of any and all mitigating circumstances could not be limited; and that the jury could not hear alleged false or misleading facts in regard to the defendant that he had not had the opportunity to explain or deny. Although by the time Sawyer's conviction became final it had been established that inaccurate and/or misleading prosecutorial remarks that were deemed improper at the guilt/innocence phase of the trial would be reviewed under the fundamental fairness standard of due process,⁶ the state could not have predicted that this Court would have applied those same standards to a penalty phase of a capital trial. Nor could the state courts have narrowed that rule as a violation of the Eighth Amendment. Thus, as established by the majority in Butler, the Caldwell rule is a "new rule" since the prevailing law at the time that Sawyer's conviction became final would not have dictated the result under the Eighth Amendment as promulgated by Caldwell.

- 2 *Although the Caldwell principle was reflected in prior state court decisions, state law does not provide a basis for determination of a "new rule" under federal constitutional law.*

The Louisiana Supreme Court is mandated to review every death sentence for excessiveness by Louisiana Code of Criminal Procedure Article 905.9., (Appendix A-1), and Louisiana Supreme Court Rule 28, (Appendix A-1). In particular, under Rule 28, the Louisiana Supreme Court is to consider the following three factors when reviewing a death sentence:

- a) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors, and
- b) Whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Even absent a contemporaneous objection relative to arbitrary comments, the court will consider a potential error because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Knighton, 436 So.2d 1141, 1157 (La. 1983), cert. denied 465 U.S. 1051 (1984); State v. Narcisse, 426 So.2d 118 (La. 1983), cert. denied 464 U.S. 865 (1983). Furthermore, the Louisiana Supreme Court has continued to reiterate that any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. State v. Knighton, supra; State v. Berry, 391 So.2d 406 (La. 1980), cert. denied 451 U.S. 1010 (1981).

The Louisiana Supreme Court considered the issue of prosecutorial reference to appellate review as early as 1980, in State v. Berry,⁷ supra. Thereafter, when it considered prosecutorial remarks at the sentencing phase, the Louisiana Supreme Court affirmed the death sentence when it found that the remark was so brief or innocuous that it would not reasonably induce a jury to believe that its responsibility was lessened by appellate review. State v. Jones, 474 So.2d 919

⁶See, Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

⁷In Berry, it was determined that the prosecutor's reference to capital sentence review was improper but did not diminish the jury's sense of responsibility.

(La. 1985), cert. denied 476 U.S. 1178 (1986); State v. Knighton, supra, State v. Moore, 414 So.2d 340 (La. 1982), cert. denied 463 U.S. 1214 (1983); State v. Mattheson, 407 So.2d 1150 (La. 1981), cert. denied 463 U.S. 1229 (1983); State v. Monroe, 397 So.2d 1258 (La. 1981), cert. denied 463 U.S. 1229 (1983); State v. Berry, supra. These cases were reviewed and affirmed under state law.

When the Louisiana Supreme Court found that the prosecutor's argument conveyed the message that the jury's responsibility was lessened by information that its decision was not the final one, or contained inaccurate or misleading information, it determined that the defendant was deprived of a fair trial in the sentencing phase and required that the death penalty be vacated. State v. Willie, 410 So.2d 1019 (La. 1982), cert. denied 465 U.S. 1051 (1984); State v. Robinson, 421 So.2d 229 (La. 1982).

It is clear from a review of these cases that the Louisiana Supreme Court rested its decisions on the state law which mandates that it review the sentencing phase of the trial to determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors. Furthermore, the court will review the penalty phase for the possibility of prejudicial influence on the jury's recommendation of death absent a contemporaneous objection relative to the comment. The Louisiana Supreme Court did not base its rulings on violations of the Eighth and Fourteenth Amendments. Since states are free to broaden the rights of defendants, the Louisiana Supreme Court's interpretation of its own rules and statutes in no way indicates that it rested its jurisprudence on federal interpretation of the Eighth and Fourteenth Amendments.

This Court clearly stated in Dugger v. Adams, 489 U.S. ___, 109 S.Ct. 1211 (1989), that the availability of a claim under state law does not of itself establish a claim that was available under the United States Constitution. Furthermore,

"mere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." Barclay v. Florida, 463 U.S. 939, 957-958 (1983). Petitioner's claim was reviewed and affirmed by the Louisiana Supreme Court under state law and its own Rule 28. Despite Petitioner's citation of numerous cases from other states to support his view that those states regarded Caldwell as a predictable development in Eighth Amendment law, many states, such as Louisiana, did not recognize a Caldwell-type violation as an infringement on the Eighth Amendment. Furthermore, many of the cases cited deal with improper comments by the trial judge which is a different issue than here. To say that a constitutional rule at the federal level could be predicted by the variety of jurisprudential developments on the state level from courts in fifty different states is ludicrous. Substantial injustice would occur if this Court decides that state law, developed in fifty individual states, could be a basis for predicting the final outcome by the United States Supreme Court on federal constitutional issues. There is absolutely no valid reason to reverse this Court's determination that a claim under state law does not of itself establish a claim that was available under the United States Constitution.

The Louisiana Supreme Court in State ex rel Busby v. Butler, 538 So.2d 164, 173 (La. 1988), refused to reexamine this same issue determining that Caldwell did not change its previous case law. Under its own court rule, the Louisiana court had chosen to extend more safeguards to defendants under the then current federal constitutional jurisprudence before Caldwell. Thus, Louisiana's recognition of improper prosecutorial argument as a matter of state law cannot be used to say that Louisiana recognized a Caldwell rule restricted by the Eighth and Fourteenth Amendments.

It is significant to look at how the Louisiana Supreme Court reviewed Petitioner's capital sentencing phase for passion, prejudice, or other arbitrary factors. In the process of

reviewing Petitioner's penalty phase, that court, under Rule 28, reviewed several factors at the sentencing phase despite the lack of a contemporaneous objection. The court considered the affect on the jury of the district attorney's brief reference to the possibility of pardon and determined, that in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation, nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations. State v. Sawyer, 422 So.2d 95, 104 (La. 1982), reh. denied Nov. 24, 1982. See, J.A. 23. The court further noted that the prosecutor improperly commented on a co-defendant's conviction and sentence because counsel's argument went beyond the record, but since there was a strong admonition by the trial court, there was no prejudice. The court continued its review of Sawyer's penalty phase by considering the excessiveness of the sentence and concluded that the jury's recommendation was not reached arbitrarily, was not based on improper considerations, and that the circumstances warranted the imposition of the maximum penalty possible. The Louisiana Supreme Court did not specifically address the prosecutor's references to appellate courts or judges nor his use of the word "recommend" at issue herein. The Louisiana Supreme Court reviewed Sawyer's penalty phase for arbitrary factors in 1982, the same year that it reversed and vacated two other death penalties. See e.g., State v. Willie, 410 So.2d 1019, 1033 (La. 1982), cert. denied 465 U.S. 1051 (1984); State v. Robinson, 421 So.2d 229, 233-234 (La. 1982). Clearly the Louisiana Supreme Court did not find that the remarks now complained of violated its rule to review the penalty phase for arbitrary factors which misdirect the jury's sentencing discretion. That court's determination in this instance should be given great weight even under Petitioner's argument, since Petitioner in fact urges the Court to believe that the Louisiana Supreme Court was interpreting constitutional violations of Eighth Amendment magnitude.

3. *Regardless of the standard of review for a Caldwell analysis, whether it is the "no effect" of Sawyer v. Butler or the "fundamental fairness" of Darden v. Wainwright, the principle announced was a "new rule" within the meaning of Teague v. Lane.*

"No Effect" Test

The Fifth Circuit in its *en banc* opinion Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), cert. granted ____ U.S. ____, 110 S.Ct. 835 (1990), vacating in part Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), determined that Sawyer was procedurally barred from using the rule of Caldwell since Caldwell issued a "new rule" of law under the meaning of Teague v. Lane and Penry v. Lynaugh. As a basis for its decision that Caldwell issued a "new rule" of law the Fifth Circuit determined that Caldwell established a single analysis for the existence of a Caldwell error and its effect on the jury which resulted in a "no effect" test. The *en banc* court said that Caldwell instructs that if the state seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we can not say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 472 U.S. at 341; Sawyer v. Butler, 881 F.2d, at 1285. The Fifth Circuit concluded that Caldwell must be read in light of McGautha v. California, 402 U.S. 183 (1971), which places at the core of the definition of Caldwell that the comment diminishes the responsibility of the jury by misdescribing its role under state law. The Fifth Circuit reasoned that once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case" it is apparent that the Donnelly issue of fundamental fairness is

subsumed in the threshold question of whether there was Caldwell error. Sawyer v. Butler, 881 F.2d, at 1285.

The en banc court appropriately turned to the question of how an appellate court would define a Caldwell error. As part of the ingredients of the definition of a Caldwell error the court concluded that the inquiry is whether, under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role, under state law, to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere. Sawyer v. Butler, 881 F.2d, at 1286. This definition inevitably requires a case by case analysis which would include all of the ingredients in the fundamental fairness standard used by Donnelly.

The Fifth Circuit concluded that Caldwell established a "no effect" test such that if a Caldwell error is determined then the sentence must be vacated as the loss of a fundamental right which outweighs any other practical consideration. The Sawyer court recognized that the doctrine of a plain error as applied to the sentencing phase of a capital case was a clear break with the past and not foreshadowed by prior case law. Thus the rule issued by Caldwell is a "new rule" of law for purposes of Teague v. Lane and Penry v. Lynaugh and Sawyer is prohibited from applying it to his case.

The State urges this Court to sanction the Fifth Circuit's opinion and reasoning in determining that the Caldwell inquiry is a single analysis which entwines the totality of the trial, the remarks themselves, the judge's reaction and comments. If it is determined that a jury's sense of responsibility for determining the death sentence is diminished, it is most difficult to determine the quantity of the diminution and, thus, the "no effect" test as established by the Fifth Circuit is a rational application of Caldwell. That is, in order to arrive at the conclusion that there, in fact, was a Caldwell error the court proposes that the ingredients in the fundamental fairness analysis should be used to so determine.

Lastly, the Fifth Circuit concluded that if Sawyer were able to show actual prejudice he would be able to proceed under the more general fundamental fairness standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Although Sawyer did not contend that such prejudice existed the Fifth Circuit, after a thorough review of the record, declared that none existed. Sawyer, at 1294. Thus under the Fifth Circuit's analysis, since Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without Caldwell, the conviction and sentence are appropriately affirmed. This Court should affirm the opinion below.

In the alternative, if this Court rejects the Fifth Circuit's reasoning then the appropriate analysis for alleged improper prosecutorial remarks is the fundamental fairness analysis of Donnelly v. DeChristoforo and Darden v. Wainwright, 477 U.S. 168 (1986).

Fundamental Fairness Standard of Review

After the decision in Caldwell, this Court reviewed prosecutorial argument in the guilt/innocence phase of a capital trial in Darden v. Wainwright, 477 U.S. 168 (1986). A majority of this Court concluded that although the prosecutor made comments that were undoubtedly improper, the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Since Darden was a case before this Court on writ of habeas corpus the majority noted that the standard of review was "the narrow one of due process, and not the broad exercise of supervisory power." Donnelly v. DeChristoforo, 416 U.S. at 642. But the Darden opinion does not cite Caldwell v. Mississippi and does not provide strict guidance to the application of Caldwell to Sawyer's case. The main difference is that Caldwell and Sawyer are concerned with prosecutorial comments at the penalty phase of the capital trial.

The Caldwell opinion used a fundamental fairness analysis to determine that the prosecutor's remarks were in fact improper and then declared that, since it could not be certain that the remarks had no effect on the jury such that its sense of responsibility for imposing the death penalty was diminished, the sentencing phase had to be vacated. Specifically Caldwell v. Mississippi raised the standards for a sentencing hearing in a capital case above the standards of a regular sentencing hearing by more clearly defining the parameters for the capital sentencing phase. States which impose death penalties do it in a variety of ways and Caldwell clearly defined that a penalty phase of a capital case required a heightened sense of reliability over other sentencing hearings in criminal cases. This Court's determination that death cases require a heightened sense of reliability was finally specifically applied to the penalty phase of a capital trial by Caldwell.

If this Court determines that the standard of review for improper prosecutorial comments at the penalty phase of a capital trial is the fundamental fairness test then the Caldwell rule is a "new rule" of law since it raises the sentencing phase in a capital trial to the constitutional levels not required by other sentencing hearings. Holding otherwise would place this Court's standards for review in the guilt/innocence phase of a capital trial, as in Darden, in confusion with the standards in the penalty phase of a capital sentencing hearing in light of prior cases that have set the standards of reliability in death cases.

The issues in the sentencing phase of any criminal proceeding are different from the guilt/innocence phase since the character of the individual, the seriousness of the crime, and the appropriateness of a sentence are relevant. In order to determine these factors, evidence is allowed at a sentencing hearing which would not ordinarily be allowed at the guilt/innocence phase of the trial. Other concerns are allowed in the sentencing hearing such as future dangerousness and prior crimes which would not be determinative of the guilt or

innocence of the defendant and would only mislead the jury to a guilty verdict based on prior activity. But when the sentencing hearing exposes a defendant to death, that sentencing hearing deserves a heightened sense of reliability unlike other sentencing hearings. Certainly the penalty phase of a capital case should not be elevated in reliability above the guilt/innocence phase. This would defy one's sense of justice since it is the initial guilt/innocence phase which determines whether or not a defendant faces a sentencing hearing. Caldwell merely refers back to Donnelly to apply the same scrutiny for prosecutorial remarks in the guilt/innocence phase as the sentencing phase of a death case.

Despite which standard of review is determined as appropriate in a capital case, under the Caldwell "no effect" test or the "fundamental fairness" Donnelly test, the Caldwell rule remains a "new rule" of law which would procedurally bar Sawyer from addressing the merits of his issue.

4. *The determination that the Caldwell principle is a "new rule" under Teague v. Lane does not conflict with the outcome in Dugger v. Adams that a Caldwell issue does not provide "cause" for abuse of the writ purposes.*

A conclusion that Caldwell issued a "new rule" of law, at first blush, seems to contradict the holding of this Court in Dugger v. Adams, 489 U.S. ___, 109 S.Ct. 1211 (1989), that Caldwell does not provide "cause" for respondent's procedural default. The majority opinion itself in Dugger resolved the apparent conflict by reiterating the definition of a Caldwell claim. When a Caldwell issue is the subject of a procedural default review then the review must turn on the principles established by this Court's prior opinions resolving procedural default issues.

In resolving the issue in Dugger, this Court stated that under Caldwell, only certain types of comments--those that misled the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible for the sentencing decision--are relevant. Dugger v. Adams, 489 U.S. at ___, 109 S.Ct. at 1215. Justice White further explained, in his majority opinion, that "to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger, 489 U.S. at ___, 109 S.Ct. at 1215. Since an essential element of a Caldwell claim is the misstatement of local law, then, if petitioner fails to address a claim available under state law, though not yet available under federal law, he has no "cause" for his procedural default in the federal courts.

This Court has repeatedly stated that the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution. Dugger v. Adams, supra, 109 S.Ct. at 1216. Although the rule issued by the Caldwell decision is a "new rule" under federal constitutional law, since it was available under state law, it does not provide cause for a defendant to fail to raise that claim in state court review. And, as the Dugger majority pointed out, the subsequent available federal claim does not excuse the procedural default. This conclusion reconciles the fact that Caldwell is a "new rule" of law as a federal claim and yet does not provide cause for procedural default since a key element of a Caldwell issue is that the improper remarks/instructions were objectionable under state law. Dugger basically answered the inquiry of whether or not Caldwell issued a "new rule" when it failed to recognize Caldwell's availability as a Federal claim to Adams. Had Caldwell been foreshadowed by Federal cases as a viable claim the Dugger court would not have had to reach the issue regarding state law and state procedural bar.

B. The Caldwell principle cannot be retroactively applied since it does not qualify under the two exceptions announced in Teague v. Lane and Penry v. Lynaugh.

This Court held in Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934 (1989), and repeated this holding in Saffle v. Parks, ___ U.S. ___, S.Ct. No. 88-1264 (1990) slip op., at 1, that a new rule of constitutional law will not be applied in cases on collateral review unless the rule comes within one of the two narrow exceptions. This limitation on the proper exercise of habeas corpus jurisdiction applies to capital and non-capital cases. Since Sawyer's capital conviction became final before Caldwell was decided in 1985, he is procedurally barred from the application of Caldwell's "new rule" unless the rule fits within one of the two exceptions set forth in Teague.

Clearly Sawyer cannot make use of the first exception. The first exception permits the retroactive application of a "new rule" if the rule places a class of private conduct beyond the power of the state to proscribe, see Teague, 489 U.S. at ___, or addresses a "substantive categorical guarantee accorded by the constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry, 492 U.S., at ___; Saffle v. Parks, supra, at ___, slip op. at 10. Since Sawyer can not contend that the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution, his Caldwell claim does not qualify for the first exception under Teague.

This Court has clearly restated the definition of the second exception as "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings. Butler, supra, at ___, slip op., at 8-9; Saffle v. Parks, supra, at ___, slip op., at 10. The objectives of fairness and accuracy are central to the theme of "watershed

rules". Stated another way, "watershed rules" are those rules that are essential to obtaining a reliable verdict that guarantees the fairness and accuracy of the proceeding. In considering which rules would be watershed rules, Justice O'Connor quoted in Teague v. Lane, 489 U.S., at ___, "we are also of the view that such rules are 'best illustrated by recalling the classic grounds for the issuance of writ of habeas corpus--that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.' Rose v. Lundy, [cite omitted]." Justice Kennedy further illustrated the definition by citing Gideon v. Wainwright, 372 U.S. 335 (1963), which held that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception. Saffle v. Parks, supra, at ___, slip op., at 10. These few examples lead us to inquire as to the nature of the "watershed rules of criminal procedure" which would be applicable to the sentencing phase of a capital trial.

The finality of death as a punishment has promoted the development of the jurisprudence to require that the proceedings in which a defendant is exposed to the penalty of death project a heightened sense of reliability such that the sentence of death is the appropriate penalty for a particular defendant and his particular crime. This heightened sense of reliability has elevated capital cases above the ordinary sentencing hearing. In other words, the reliability of the determination that death is the appropriate sentence for a particular defendant must be supported by the fairness and accuracy of the proceeding. In Furman v. Georgia, 408 U.S. 238 (1972), this Court determined that because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Thereafter, this Court has continued to refine the rules for insuring that the death penalty not be imposed in an arbitrary or capricious manner. In Woodson v. North Carolina, supra,

this Court held a mandatory death penalty unconstitutional. A further refinement is that the sentencing phase should be focused on the particularized circumstances of the individual offense and the individual defendant before a jury can impose a sentence of death. Gregg v. Georgia, supra. Moreover, the sentencer's discretion must be narrowed and channeled by clear and objective standards that provide specific and detailed guidance. Godfrey v. Georgia, 446 U.S. 420 (1980). A defendant has a right to refute any information which the state presents to the sentencing jury. Gardner v. Florida, supra.

The rule issued by Caldwell that a prosecutor's remarks should not diminish a juror's sense of responsibility is not the type of rule that affects the reliability of the sentencing determination in an *immediate* way. In other words, it is necessary that the sentencing determination be reliable. To this end, Gardner v. Florida, supra, directly insures the reliability of the sentencing determination by insisting that the defendant have the right to refute any information that the state may produce. But the rule issued by Caldwell is designed to reduce the risk that the jury's decision was arbitrary and/or capricious. See, Butler v. McKellar, supra. The Caldwell rule is a prophylactic rule which is designed to lessen the possibility that the jury rested its decision elsewhere. Since there is no way of knowing whether a jury is affected by certain information the sentencing hearing must be governed by certain rules which will reduce the risk of an unreliable verdict. Rules which reduce the risk of unreliability are enhancement rules and not core rules that would ensure the reliability of criminal proceedings.

Caldwell condemns the prosecutor's reference to appellate review and misleading or inaccurate statements of state law based on a risk that the jury would be misled. And, further, based on an unreliable risk that the jury would not render a verdict that was based on a realization that it was the sentencer in the case. Although the Caldwell rule is designed to reduce the risk of an unreliable verdict it is not essential to

getting a reliable verdict. A "watershed rule" for the penalty phase of a capital trial is a rule that is essential to a reliable verdict, not a rule, like Caldwell, that only reduces the risk of unreliability.

One of the serious concerns at the core of the Caldwell rule is that the misleading or inaccurate information would be communicated to the jury which would form the basis of its decision for a sentence of death. Since it is impossible to second guess what information a juror brings to the courtroom with him, it seems that it would be in the best interest of an accurate and reliable sentencing determination that the jurors be informed correctly regarding appellate review. In today's rapid communication society, it is unlikely that jurors have not heard reference to convictions which were overturned by appellate courts. They certainly bring an awareness of appellate review to the jury room. If the concern is misinformation then perhaps we should consider that telling a jury something that is accurate is better than continuing its misconceptions. The issue should not be telling jurors something accurate versus telling them something inaccurate.

Nevertheless, the "new rule" issued by Caldwell is an enhancement of "watershed rules" of criminal procedure that the sentencing determination be reliable. It is not a bedrock procedural element that goes to the core of the accuracy of the sentencing proceeding itself since it merely reduces the risk of an unreliable verdict. As such, the Caldwell rule does not qualify as an exception under Teague and is thus unavailable to Petitioner's claim.

II.

THE PROSECUTOR'S REMARKS TO SAWYER'S CAPITAL SENTENCING JURY WERE NOT IMPROPER OR MISLEADING UNDER CALDWELL V. MISSISSIPPI AND THE EIGHTH AMENDMENT, AND SAWYER IS NOT ENTITLED TO A NEW SENTENCING HEARING.

- A. Since the Prosecutor's remarks were not misleading under Caldwell, when reviewed within the entire trial record, Sawyer is not entitled to a new sentencing hearing.

Robert Sawyer asks this Court to vacate his death sentence on the grounds that his prosecutor violated the holding of Caldwell v. Mississippi, supra. In brief, he claims that he is entitled to this relief because ". . . false or misleading information about the non-finality of a death verdict has been communicated to the sentencer" (Brief. 44, n. 15) and because the prosecutor engaged in "bad argument." (*Id.* 50). These bases, however, do not establish a Caldwell violation. Caldwell, at 472 U.S. 328, 329, held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Thus, the pivotal question is not whether false or misleading information has been communicated to the jury or whether the prosecutor engaged in bad argument, but is, instead, whether the jury has in fact been misled. That this is the proper focus for the inquiry is supported by Darden v. Wainwright, supra: it is not enough that comments are improper, undesirable or universally condemned. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The en banc court below correctly recognized that the inquiry is whether the state has misled the jury regarding its role under

state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

Sawyer recognizes this inquiry. His recognition, however, deems this as one of several factors which may constitute a Caldwell violation. The inquiry as to whether the jury has been misled must necessarily focus on the entire record. This contextual review is not precluded by Caldwell despite Sawyer's contrary representations. (Brief, 54). Indeed, such a review is approved by this Court. "The principle that prosecutorial comment must be examined in context is illustrated by our treatment of a Fifth Amendment claim in Lockett v. Ohio, 438 U.S. 586 (1978)." United States v. Robinson, 485 U.S. ___, 108 S.Ct. 864 (1988). Although Robinson was not a capital case, Lockett was. Just recently this Court, in a capital case concerning a challenged jury instruction and prosecutorial argument in the penalty phase, stated that differences among jurors' "interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial . . ." Boyd v. California, ___ U.S. ___, 58 U.S.LW. 4301 (No. 88-6613, March 5, 1990) (emphasis added). This pronouncement, according to Boyd, is equally applicable to argument. Id., 4305. This Court has also stated, in a non-capital case, that a prosecutor's statements "must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1 (1985). The Fifth Circuit (en banc) below, 881 F.2d at 1286, acknowledged that the inquiry must focus on the entire record:

We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for

determining the appropriateness of defendant's death rests elsewhere.

It is, therefore, necessary and appropriate that an examination of the entire proceedings be conducted to conclude whether or not a Caldwell error occurred.

The trial began, of course, with jury selection. Each prospective juror was questioned separately. Each juror, therefore, was the sole focus of the questions and comments; no prospective juror could hide in the crowd. Each of the twelve jurors was told that a jury was being selected for a first degree murder trial and that, should Sawyer be found guilty as charged, the jury would have to decide on his sentence. The sentence would be life imprisonment or death by electrocution. Typical of the accurate information imparted to each juror individually was that related to juror Elm Wood:⁸

Again if you are selected there will be two trials possibly. The first trial will be strictly as to the guilt or innocence of the Defendant. If the jury unanimously decides that Robert Sawyer did in fact commit first degree murder of Frances Arwood there will be another trial and that trial will be the penalty phase of the proceedings and the jury and the jury alone will decide the penalty appropriate in this case. There are only two penalties, life imprisonment or death in the electric chair.

Appendix C-9.

⁸Excerpts from the voir dire for each juror selected for Robert Sawyer's jury are reprinted in Appendix C.

In addition to this information being explicitly communicated to each juror individually, the individual voir dire implicitly told each juror of the seriousness of the proceedings and their responsibilities.

In his opening statement, the prosecutor told the jury that "an opening statement in and of itself like closing arguments are not evidence." Appendix B-1. Also, during the opening statements the court told the jury that "Mr. Boudousque's opening statement is not evidence nor testimony and neither is Mr. Weidner's. These arguments are not evidence and not testimony." Appendix B-1.

In its closing argument at the guilt phase the State told the jury that ". . . you are then going to have to make some serious decisions and that's not easy but that is what the criminal justice system is all about and that is what a jury is all about. . . ." Appendix B-1.

At the close of the guilt phase the court gave the following instructions:

If you find the accused guilty of first degree murder, then you the jury will have to meet again, and determine the proper punishment. You would then consider the circumstances of the offense and the character and propensities of the offender, and other mitigating factors, and determine if the death sentence should be imposed, or if the defendant should be imprisoned for life, without benefit of probation, parole or suspension of sentence.

Appendix B-1.

The jury was also instructed that "arguments are not evidence," Appendix B-1, that they were "to decide this case fairly and impartially, without fear or favor, and without passion or prejudice" and that "You, as jurors, bear the responsibility of deciding the case." Appendix B-2.

After deliberating for almost three hours the jury returned the unanimous verdict of guilty as charged. The jury was then told that it had to determine what penalty to impose. Before beginning the penalty phase the court instructed the jury:

Ladies and gentlemen, this phase of the trial is what is called a sentencing hearing. The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that should be imposed. You now have the duty to recommend whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence. [Emphasis added.]

J.A. 5.

After the presentation of witnesses the arguments began. J.A. 5. The complete text of the closing arguments appear in the Joint Appendix. Besides making the complained of comments, other comments that the prosecutor made should not go unnoticed or unacknowledged. He told the jury ". . . that the sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exist and after consideration (sic) any mitigating circumstances recommends the sentence of death be imposed." *Id.*, p. 6. He also stated that ". . . you cannot deny, it is a difficult decision. No one likes to make those type of decisions but you have to realize if but for this man's actions,

but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision." Id., p. 7. They were also told that "The decision is in your hands." Id., p. 8.

In his argument, Sawyer's attorney told the jury:

The decision whether Robert Sawyer lives or dies is in your hands. . . . Should you decide today that he gets life imprisonment, well then the issue of whether or not he would be executed never comes up again. The issue remains a life (sic) only if you decide that he should be executed. . . . Don't kill.

J.A. 10.

In his rebuttal argument the prosecutor, inter alia, acknowledged to the jury that its decision would be difficult or unpleasant. Id., p. 13.

At the conclusion of the argument the court again instructed the jury on the penalty that it had to determine: life imprisonment or death by electrocution.

The jury was instructed:

Having found Robert Sawyer guilty of first degree murder you must now determine whether he should be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence.

* * * *

Before you decide that a sentence of death should be imposed you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance exist. . . . Even if you find the existence of an aggravating circumstance you must also consider any mitigating circumstances before you decide a sentence of death should be imposed.

* * * *

The first formal verdict reads having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death. In the event you should unanimously decide the death penalty should be imposed, a space is provided for you to write out the statutory circumstance or circumstances unanimously found to exist. ... It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment. (Emphasis added.)

J.A. 13-16.

Respondent submits that the jury could not have been misled on this record. There is no reason to believe that Sawyer's jury did not view its "task as the serious one of determining whether a specific human being should die at the

hands of the State." Caldwell, at 329. Caldwell speaks of "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others. . . ." Id. at 333. As shown above, any improper comments were corrected. They were corrected by other comments of the prosecutor, defense counsel and, most importantly, by the court's comments and instructions.

Sawyer's reliance on Caldwell's statement that "even if the prosecutor's later comments did leave the jury with the view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous insistence that the jury's determination of the appropriateness of death would be reviewed by the appellate court to assure its correctness" Id., at 340-341 n. 7, is misplaced because the facts of Caldwell are distinguishable from those herein. Unlike the misleading comments in Caldwell, these comments, even if not retracted by the prosecutor, were certainly undermined by his comments on the serious role and duty of the jury made in the initial individual voir dire and in his comments which contradicted those at issue herein. Certainly Sawyer's prosecutor's comments, unlike those in Caldwell where the jury was expressly told that "your decision is not the final decision . . . your job is reviewable," Id. at 325, cannot be characterized as an "insistence".

This is evident when realizing that, as shown above, (1) the issue is not whether "bad argument" or improper comments were made, but whether the jury was misled, (2) the comments are to be considered in context, and (3) concomitantly, the court's instructions carry greater weight with the jury than do counsel's arguments. "Arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law . . . they (arguments) are not to be judged as having the same

force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." Boyde, at 4305. Respondent, supported by this Court's decisions, disputes Sawyer's assertion that Caldwell precludes correcting improper prosecutorial comments with other prosecutorial comments, jury instructions and judge's comments, and that Caldwell error occurred herein.

The distinction between improper comments and a Caldwell violation is an important one and this Court should not equate the two because, by definition, they are two different things: improper argument does not equal Caldwell error. It bears repeating: the issue is not whether improper comments were made but whether the jury was misled. Further distinguishing Caldwell error from the comments made herein are that the comments in Sawyer's case cannot be characterized as "quite focused, unambiguous, and strong" as they were in Caldwell, supra, at 340. Sawyer's jurors, unlike Caldwell's, were never told that they were not the final decision makers. The prosecutor's reference to the courts was part of a general statement that included the trial court and the people of the parish and was intended to emphasize the jurors' roles as a unit. The reference to the courts was ambiguous and, unlike in Caldwell, made no mention of appellate review. The prosecutor's remark at issue here, that the jury's verdict would be a recommendation was an accurate statement of the law. See La.C.Cr.P. art. 905.6 and 905.8. Appendix A-1. Any notion that the use of the word "recommendation" was misleading is disabused by the record. The jury was instructed that its recommendation was a binding one. J.A. 5. In context, the reference to "all the judges that are going to review this case. . . and to any other court that reviews Robert Sawyer's case," J.A. 9, 13, does not violate Caldwell because, in context, they are only part of an argument centered on the community which the jury represents and because a sentence of death would be telling that community that this crime should be punished to the full extent of the law

and that the jury has the courage of its convictions. None of the argument was inaccurate or misleading. Any doubt about this should be resolved against such a conclusion because of the repeated references telling the jury what its responsibility was.

It is a misstatement of law, therefore, for Sawyer to contend (1) that improper argument equals Caldwell error and (2) that improper argument cannot be corrected by, inter alia, jury instructions. It needs no citation to acknowledge the important role played by jury instructions in a criminal trial. It is error, therefore, for Sawyer to shrug off correct jury instructions binding on the jury as merely "boilerplate" instructions which can be ignored. Boyde's pronouncements on jury instructions are, again, equally applicable to the argument at issue herein: "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." Boyde, at 4304.

B. A "fundamental fairness" analysis is proper under Caldwell and within the context of the Fifth Circuit's "no effect" test.

As an adjunct to the determination of whether a Caldwell violation occurred, the standard of reviewing a Caldwell violation, if established, must also be addressed. Caldwell, at 340, stated that "such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." Although Caldwell also states that "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires,"

the "fundamental fairness" standard is firmly established in this Court's jurisprudence.

In Donnelly v. DeChristoforo, supra, this Court granted certiorari "to consider whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights." This Court stated that its review was the narrow one of due process, and not the broad exercise of supervisory power that it would possess in regard to its own trial court. Id., at 642. This was "important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Id. Viewing the complained of comments in context this Court concluded that they did not make "respondent's trial so fundamentally unfair as to deny him due process." Id., p. 645. This Court, in reinstating the conviction in Donnelly, at 647, 648, said that to not do so would render "virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in Miller and Brady, supra, to amount to a denial of constitutional due process." This judgment maintained that the distinction should continue to be observed.

Similar support for this contention is found in Hopkinson v. Shillinger, 888 F.2d 1286, 1293, 1294 (10th Cir. 1989) (en banc). The Tenth Circuit concluded that this Court did not adopt a "no effect" test for Caldwell error because it would be impossible for a reviewing court to say that a remark that violates Caldwell had no conceivable effect on a sentencing decision. Such a standard would amount to a per se rule requiring reversal which this Court has not erected. The court noted that Caldwell employed a "fundamental fairness" analysis before using the "no effect" phrase. This Court's language in two other cases included "no effect" without suggesting it was a per se standard requiring reversal. Skipper v. South Carolina, 476 U.S. 1 (1986); Franklin v. Lynaugh, 487 U.S. 164 (1988) (O'Connor, J., concurring). The Tenth Circuit agreed

with other cases of this Court addressing Eighth Amendment issues, including concurring and dissenting opinions, which have relied on standards which permit the exercise of some degree of judgment on appellate review.

The Eleventh Circuit in Tucker v. Kemp, 802 F.2d 1293, 1295-1296 (11th Cir. 1986) (en banc), cert. denied 480 U.S. 911 (1987), also used a fundamental fairness approach derived from the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). In Tucker the prosecutor made several improper comments at the sentencing phase of Tucker's trial. On remand the court found that the comments, when viewed in light of the entire record, did not constitute Caldwell violations. Referring to Darden v. Wainwright, supra, the Tucker court found that Darden reiterated that the standard in a habeas case for assessing improper prosecutorial comment is, as initially enunciated in Donnelly v. DeChristoforo, supra, whether the proceeding at issue was rendered fundamentally unfair by the improper argument. When it used the prejudice prong of Strickland v. Washington, supra, for its analysis the Eleventh Circuit asked whether there was a reasonable probability that, in the absence of the offending remarks, the sentencing outcome would have been different. The court concluded that this standard properly describes the fundamental fairness inquiry--whether the improper remarks were of sufficient magnitude to undermine confidence in the jury's decision. Tucker, at 1296.

The standard of review for alleged improper remarks as found in this Court's jurisprudence, as well as the Federal Appellate Courts', is a "fundamental fairness" inquiry with variations of language. Even this Court's use of "no effect" language in Skipper and Franklin is altered by further language which denies a "per se" rule. Furthermore, the "fundamental fairness" analysis is incorporated into the Fifth Circuit's "no effect" test such that it is not a "per se" rule.

- C. Application of the harmless error doctrine, if Caldwell error is found, will not result in a new sentencing hearing because any error was harmless beyond a reasonable doubt since it did not contribute to the sentence imposed.

The inquiry is not ended should this Court find that Caldwell error occurred since application of the harmless error doctrine will leave the sentence intact. This conclusion is supported by Sawyer's brief and by this Court's jurisprudence including Caldwell. In brief Sawyer writes "the Court in Caldwell placed the burden on the state to show the harmlessness of any such error." (Brief, 38). This Court has previously applied the harmless error doctrine in capital cases. Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792 (1988), and Gilbert v. California, 388 U.S. 263 (1967). See also Zant v. Stephens, 462 U.S. 862 (1983), which stated that ". . . not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment. . . ." Id. 885, and that ". . . any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process." Id. 889. This Court in Caldwell also referred implicitly to the harmless error doctrine when it spoke of "evaluating the prejudicial effect of the prosecutor's argument. . . ." Caldwell, at 332. It further addressed the harmless error doctrine in Rose v. Clark, 478 U.S. 570 (1986):

"The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence; United States v. Nobles, 422 U.S. 225, 230 [95 S.Ct. 2610, 2166, 45 L.Ed.2d 141] (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial

rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."). Delaware v. Van Arsdall, *supra*, 475 U.S. at 681.

Rose v. Clark, at 577.

In determining whether error requires reversal or can be considered harmless the court in Rose also stated that Chapman v. California, 386 U.S. 18 (1967) "mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless. . . . The question is whether 'on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt.'" *Id.* 583. Respondent submits that for the same reasons that no Caldwell violation occurred that, if this Court finds it did occur, it was harmless and can serve as no basis to vacate Sawyer's sentence. Respondent submits that on this record it can be said beyond a reasonable doubt that the complained of comments did not contribute to the sentence obtained. Rose, at 578. Robert Sawyer received his constitutional right to a fair trial. It is well to remember, as stated by this Court in 1972, that "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards." Milton v. Wainwright, 407 U.S. 371, 377 (1972). It should also be borne in mind that relief is not warranted "where the claimed error amounts to no more than speculation." Boyde, 4304. Nor is it warranted "simply by demonstrating that an alleged trial-related error could or might have affected the jury." *Id.*, n. 4. As all Sawyer has presented to this Court is speculation, he is entitled to no relief.

CONCLUSION

The judgment below should be affirmed since Caldwell issued a "new rule" of law that cannot be retroactively applied to Sawyer's case. Furthermore, the Caldwell rule does not fit within either of the two exceptions and, thus, is not available to Sawyer. Nevertheless, when the remarks complained of in Sawyer are viewed within the context of the entire trial, they do not diminish the jury's sense of responsibility in violation of the Eighth Amendment.

Respectfully Submitted,

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APPENDIX

APPENDIX "A"

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.9. Review on Appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

RULE XXVIII. CAPITAL SENTENCE REVIEW**Rule 905.9.1 (applicable to La.C.Cr.P. Art. 905.9)**

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded

seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, effective Jan. 1, 1978.

APPENDIX "B"**Excerpt From The Opening Statements**

MR. BOUDOUSQUE:

May it please the Court and Counsel for the Defendant and more importantly ladies and gentlemen of the jury. We are at the phase of the proceedings known as an opening statement. An opening statement in and of itself like closing arguments are not evidence.

* * * *

(R. 1057).

THE COURT:

The Court overrules that objection. Go ahead. Let the Court advise the jury, Mr. Boudousque's opening statement is not evidence nor testimony and neither is Mr. Weidner's. These arguments are not evidence and not testimony.

(R. 1073).

Excerpt From The State's Closing Argument

. . . you are then going to have to make some serious decisions and that's not easy but that is what the criminal justice system is all about and that is what a jury is all about so again I thank you.

(R. 1431).

Excerpt From Jury Instructions At Guilt Phase

If you return a verdict of guilty of second degree murder or manslaughter, the Court, not the jury, will impose sentence. If you return a verdict of not guilty, the accused will be discharged.

If you find the accused guilty of first degree murder, then you the jury will have to meet again, and determine the proper punishment. You would then consider the circumstances of the offense and the character and propensities of the offender, and other mitigating factors, and determine if the death sentence should be imposed, or if the defendant should be imprisoned for life, without benefit of probation, parole or suspension of sentence.

* * * *

While the defense is not required by law to make an opening statement, in this case Mr. Weidner did make such a statement. The same rules apply to this statement as to the District Attorney's opening statement. These statements are not proof, and please don't consider them as such.

You should carefully consider the closing arguments of counsel insofar as such arguments will assist you in arriving at a just verdict, but the closing arguments are not evidence. You are to draw your own conclusions, based on the evidence and the testimony you have heard.

* * * *

You are to decide this case fairly and impartially, without fear or favor, and without passion or prejudice. . . . You, as jurors, bear the responsibility of deciding the case.

(R. 1452-1454, 1457, 1458).

APPENDIX "C"

Selected Excerpts From Voir Dire

VICTOR CYPRIEN RAGAS was called as a prospective juror and after first being duly sworn was examined and testified as follows:

* * * *

Q. Now if in fact you are selected as a juror and that jury does find Robert Sawyer guilty of first degree murder, the jury will come back, the same jury. There will be another trial with possibly other evidence introduced to determine the penalty the Defendant is to obtain. That penalty would be mandatory life imprisonment without probation, parole, or suspension of sentence. Mandatory life imprisonment does not speak of commutation, pardon, or good time or he could possibly receive death in the electric chair. What are your feelings about capital punishment.

A. I have never really given it any thought because I have nothing against it.

(R. 492)

LAURA TROTTER ROTH was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now if you are selected to serve as a juror and that jury does in fact find that the Defendant is guilty of the crime of first degree murder there will be a second trial. The same jury. Same case. It might be some additional evidence presented. At that trial and only after the jury has found unanimously he is guilty of first degree murder,

the jury will have to decide based on the evidence presented whether they will cast their vote for the death penalty or whether the man shall serve the rest of his life in prison without benefit of parole, probation or suspension of sentence. Now parole, probation or suspension of sentence does not mean good time, commutation or pardon. You follow what I am saying. Certain things you have (sic) to understand here. If you do not understand the subtle distinction let me know and I will explain them to you better. Don't be nervous. What are your feelings about the death penalty?

A. I believe that the death penalty is justifiable.

Q. You believe under certain circumstances the evidence may justify the imposition of the death penalty?

A. Right.

* * * *

Q. You can see by now we are talking about quite a serious thing here and you will have to make some serious decisions but that is what justice is all about. Okay, one other thing.

* * * *

(R. 550, 555).

THEODORE GUSTAVE ANDRESSEN was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now another important thing relating to the crime of first degree murder, again if the jury and you are on this jury and you heard all the evidence and that jury unanimously decides the Defendant in fact did in fact commit the crime charged, well then you will have another hearing. Once

the jury has found he is guilty of first degree murder you will have another trial with the same jury, same cast of characters, except there will be additional evidence that may be introduced and at that hearing you will make a decision as to whether the Defendant will spend the rest of his life in jail without benefit of parole, probation, or suspension of sentence or be sentenced to die in the electric chair. Now parole, probation, or suspension of sentence does not mean the man will not get good time, does not mean he will not be given a commutation of sentence or pardon by the Governor. Do you understand that. What are your feeling toward capital punishment?

A. I think we should have it.
(R. 570).

KIRK MICHAEL DRUMM was called as a prospective juror and after first being duly sworn on the oath of voir dire was examined and testified as follows:

* * * *

Q. Do you understand the definition of first degree murder. If you are selected to serve as a juror in this matter there will be possibly two trials. The same jury, the same Judge, same other case. The first trial will be solely as to the guilt or innocence of the Defendant as it relates to the crime of first degree murder. If the jury in fact does find unanimously that Robert Sawyer did commit first degree murder of Frances Arwood, there will be a second trial and that second trial will be strictly as to the penalty phase of the proceedings. The jury will make the decision what penalty should apply and in this case based on the facts there is only one penalty under Louisiana law for first degree murder. It is either life imprisonment or death in the electric chair. What are your feelings about capital punishment?

A. I have been going over that for the last week and I cannot come to a definite answer on it.

Q. Do you think there are certain circumstances that the evidence may be so strong and so heinous that you could at least consider the imposition of the death penalty?

A. Yes sir.

* * * *

(R. 652).

RONALD AKERMAN, JR. was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now if you are selected to serve as juror in this matter there will be two trials. The first trial will be strictly an evidentiary trial relating to the facts as to the guilt or innocence of the Defendant.

A. Right.

Q. You follow me. You are to be a fact finding body as to whether the man is guilty of first degree murder and if in fact that jury unanimously decides Robert sawyer committed first degree murder of Frances Arwood, there will be another trial with the same jury, same characters and other evidence may or may not be presented at that trial for the purpose of determining the sentence. The jury must unanimously decide at that point in time whether the Defendant would be sentenced to life imprisonment or whether he be sentenced to die in the electric chair. Are you opposed to capital punishment?

A. I am not against it.

Q. Under certain facts and circumstances if you feel the evidence so warrants can you impose the death penalty?

A. I think so.

* * * *

PETER CACIOPPO was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now if you are selected to serve as a juror there may be two trials in this case. The first trial will be as to the guilt or innocence of the Defendant. Evidence will be presented strictly as to that fact. If the jury unanimously decides that Robert Sawyer did commit first degree murder of Frances Arwood, there will be a second trial and that second trial there may or may not be other evidence presented but will be strictly as to the penalty phase of the proceedings. What penalty the jury will decide the Defendant will get and the two choices are life imprisonment or death in the electric chair. What are your feelings about capital punishment. If you are just say so now, now is the time to say and don't feel ashamed in your belief one way or the other.

A. I would think that I am not opposed to it.

Q. You are not opposed to the death penalty. Have you ever given it any consideration?

A. Not enough really.

Q. Again if you are selected to serve as a juror there is a real possibility you may have to sit down and make that decision. You will be one of twelve but if and when that decision is made it may have to be made by you and

eleven other people so if you have never thought about it now is the time if you don't think you can tell me, if you think you can tell me also. We are all interested in this question.

A. Let's say whether I do believe in the death penalty.

Q. Whether you could cast your vote.

A. I probably could.

* * * *

(R. 706).

FRANK ALBERT LEABER, JR. was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. If you were selected to serve as a juror there will possibly be two trials. The first trial will be solely as to the guilt or innocence of the Defendant of the crime of first degree murder of Frances Arwood. If the jury unanimously decides the Defendant is guilty of first degree murder there will be a second trial. The second trial relates exclusively to the sentencing phase of the proceedings. There are only two options related at that point in time, one will be life imprisonment, the other will be execution in the electric chair. What are your feelings about capital punishment. Are you opposed to capital punishment?

A. I'm not opposed to it. I am not against it.

Q. Could you cast a vote in favor of capital punishment if you feel the facts surrounding the crime so warrants?

A. I guess I could.

Q. You could at least consider it?

A. I could consider it.

Q. You realize if it comes to that point in time you will have to cast your vote one way or the other.

A. Yes.

* * * *

(R. 774).

MITCHELL VANCE POLLACK was sworn as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. If you were selected to serve as a juror there is a possibility of two trials. The first trial will be merely as to the guilt or innocence of the Defendant based on evidence presented. If the jury unanimously decides Robert Sawyer did in fact commit first degree murder of Frances Arwood, there will be a second trial. The same jury, same judge, and the same other cast of characters but that trial will relate exclusively to the penalty phase of the proceedings. The jury at that point in time will decide what penalty will be given to the Defendant.

A. Yes.

Q. At that trial there may or may not be other evidence introduced in support of the penalties. The two penalties are either, you know, one or the other. It's life imprisonment or death in the electric chair. What are your feelings about capital punishment? Are you opposed to capital punishment?

A. No.

Q. There are times when you can consider the death penalty may be necessary in certain types of crimes?

A. That is true.

(R. 792).

SUSAN B. ROUNDTREE was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Now Mrs. Roundtree, as I told you the Defendant has been indicted by way of Grand Jury with the crime of first degree murder. Under the law of Louisiana if you are selected to serve as a juror there may be two possible trials that you will have to participate in. The first trial will be solely as to the guilt or innocence of the Defendant for the crime of first degree murder of Frances Arwood. If in fact jury unanimously returns a verdict that the Defendant is guilty of the crime of first degree murder there will be a second trial where the jury will decide what penalty will be appropriate to the crime charged. There may or may not be other evidence produced at the second part of it and that will be solely relating to the penalties. There are two possible penalties and only two possible penalties for first degree murder, life imprisonment or death in the electric chair. Are you opposed to capital punishment?

A. No.

Q. Do you feel from evidence there are certain types of crimes that may be so shocking or so heinous that the imposition of the death penalty may be well justified or warranted, do you not?

A. Yes.

Q. But you understand that decision will be made by the jury as a whole and it must be a unanimous decision of the entire jury before they would come to that conclusion.

A. Right.

* * * *

(R. 835, 836)

ELM D. WOOD, JR. was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Again if you are selected there will be two trials possibly. The first trial will be strictly as to the guilt or innocence of the Defendant. If the jury unanimously decides that Robert Sawyer did in fact commit first degree murder of Frances Arwood there will be another trial and that trial will be the penalty phase of the proceedings and the jury and the jury alone will decide the penalty appropriate in this case. There are only two penalties, life imprisonment or death in the electric chair. Are you opposed to capital punishment?

A. No I am not.
(R. 867).

MS. DEBORAH DUNN, was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. Great. Now, my second and very most important question is that there will probably be two trials. In a first-degree murder case, the first trial will be solely as to the guilt or innocence of the Defendant. If the jury unanimously

finds, if all twelve of you find that Robert Sawyer did in fact commit first-degree murder of Frances R. Wood (sic) on September 28th of last year, then there will be a second trial and that second trial the jury will decide what the penalty will be for the Defendant. There are only two choices. It's either or the first choice is life imprisonment or the second choice is death in the electric chair. And, the jury must unanimously decide what is the appropriate penalty according to the facts that are presented in the case. Now, during the second trial there may or may not be other evidence introduced to substantiate a life imprisonment or death in the electric chair, but that will be reached only after the first trial is concluded (sic). My question, then is: What are your feelings about capital punishment? Are you opposed to capital punishment?

A. No, I'm not.

Q. Do you feel in certain factual circumstances if the evidence so warrant that it may be justified?

A. Yes, I do.
(R. 947, 948).

ELOISE S. GUSMAN, was called as a prospective juror and after first being administered the oath of voir dire was examined and testified as follows:

* * * *

Q. In any event my next question is if you were selected to serve there is a possibility there will be two trials. If you don't understand the nature of my questions or I'm going too quickly for you stop me, now is the time. There will be two trials, the first trial will be strictly as to the guilt or innocence of the Defendant on the crime of first degree murder. The jury unanimously decides Robert Sawyer did

commit first degree murder of Frances Arwood there will be another trial and that trial will be relating strictly to the penalty phase of the proceedings. The jury will decide the penalty phase. There may or may not be other evidence presented at that trial. There may be evidence that is different from the first trial. The penalty in Louisiana for first degree murder is life imprisonment or death in the electric chair. Are you opposed to capital punishment?

A. No I am not.

* * * *

(R. 1011).

No. 89-5809

Supreme Court, U.S.

FILED

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JOSEPH E. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

This Court's decisions in *Butler v. McKellar*, ___ U.S. ___, 58 U.S.L.W. 4294 (U.S. March 5, 1990) and *Saffle v. Parks*, ___ U.S. ___, 58 U.S.L.W. 4322 (U.S. March 5, 1990) were handed down on the same day that the Brief for Petitioner was served on the State and mailed to the Court. Both cases are treated here, because they create doctrine that relates directly to the disposition of the first Question Presented in Robert Sawyer's case concerning the retroactivity of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Respondent relies heavily on *Butler* and *Parks*, but overlooks their actual analysis of the methodology to be used in resolving "new law" questions under *Teague v. Lane*, 489 U.S. ___, 109 S. Ct. 1060 (1989). See Brief for Respondent at 8, 9, 13-16, 27-29.

Butler and *Parks* support Robert Sawyer's position that *Caldwell* is "old law" and thus should be applied retroactively to his case under *Teague*. Given the uniform state court consensus that approved the *Caldwell* rule, there is no evidence either that reasonable state courts rejected the rule or that they believed *Caldwell*'s outcome was "susceptible to debate" before *Caldwell*. *Butler*, *id.* at 4297. Moreover, Eighth Amendment precedents supported the state court consensus favoring the *Caldwell* rule. Thus under *Butler* and *Parks* there is no evidence that a logical reading of the precedents could have supported a result opposed to *Caldwell*. See *Butler*, *id.*; *Parks*, *id.* at 4322, 4324.

Butler and *Parks* also show that *Caldwell* is not disqualified from treatment as a rule falling within *Teague*'s fundamental fairness exception to the non-retroactivity principle. Unlike rights whose enforcement may decrease the likelihood of obtaining accurate convictions or sentences, the *Caldwell* right is one whose enforcement can

only work to preserve the accuracy of verdicts in the death sentencing process. *Cf. Butler, id.* at 4297; *Parks, id.* at 4325.

In assessing the proper status of *Caldwell* under *Teague*, Respondent urges this Court to disregard the state court adoptions of *Caldwell* in the pre-*Caldwell* era; Respondent also argues that *Caldwell*'s correction standard should be modified. See Brief for Respondent at 19, 31-44. Both of these arguments should be rejected, because they are not supported by the relevant authorities and because they would contravene the teachings of both *Teague* and *Caldwell*.

I. UNDER THE TWO-STEP INQUIRY OF *BUTLER* AND *PARKS*, *CALDWELL* IS RETROACTIVE OLD LAW BECAUSE IT WAS ANTICIPATED BY REASONABLE STATE COURTS AND BECAUSE EIGHTH AMENDMENT PRECEDENTS COULD BE READ ONLY TO SUPPORT THE *CALDWELL* RULE.

A. The State Court Rulings Endorsing the *Caldwell* Rule Show That State Courts Reasonably Would Have Regarded *Caldwell* As Old Law.

Butler and *Parks* dictate that the search for evidence of the "new law" status of a constitutional rule should focus on two sources: the state court rulings that precede this Court's adoption of the rule and the precedents that informed those state court rulings. See *Butler*, 58 U.S.L.W. at 4296-4297; *Parks*, 58 U.S.L.W. at 4323-4324. *Butler* and *Parks* examine state rulings as the first step of a *Teague* "new law" inquiry, and find that two typical state patterns supply helpful, though not determinative, evidence that a rule is "new law"—namely, state rejection of a rule, or a division among courts over the endorsement of a rule. See *Butler, id.* at 4297 (describing division over adoption of rule); *Parks, id.* at 4323 (describing rejection

of rule); *id.* at 4325 n.2 (Brennan, J., dissenting) (noting some division over rejected rule).

By contrast, evidence of the "old law" status of a rule is demonstrated in two ways when state courts endorse it, as in the case of the state court adoptions of the *Caldwell* rule before *Caldwell*. See Brief for Petitioner at 18-22 & nn. 4, 6; *id.* at 34-35 n.13. A strong state consensus approving a rule shows that state courts would have regarded that rule as dictated by the precedents before it was adopted by this Court. Such a consensus also shows that state courts would have assumed that the rule would be retroactive once ratified by this Court.

Therefore, the evidence of *Caldwell*'s endorsement by state courts should produce the opposite conclusion from that reached in *Butler* and *Parks*, where reasonable state rejections of constitutional rules justified the finding that those rules were "new law" under *Teague*. See *Butler, id.* at 4297 (relying on state division over rule adopted in *Arizona v. Roberson*, 486 U.S. 675 (1988)); *Parks, id.* at 4323 (relying on state rejections of claim made by *Parks*). In *Butler* and *Parks*, retroactive application of unpredictable rules was rejected because it would have no deterrent value. The *Caldwell* rule, however, was predicted by state courts, and its retroactive application is needed in order to affirm the role of habeas review as an incentive for state courts "to conduct their proceedings in a manner consistent with established constitutional principles." *Teague*, 109 S. Ct. at 1073 (cited in *Butler, id.* at 4296 and *Parks, id.* at 4323).

The one-sided pattern of state court acceptance of the *Caldwell* rule shows that state courts before *Caldwell* would have had no trouble discerning the constitutional support for a ban on false and misleading prosecutorial

argument about the jury's role as the final arbiter of death. As determined by *Butler* and *Parks*, state rulings are relevant to the *Teague* inquiry because they reveal the state courts' perspective on the constitutional standards of a particular era. State rulings can also show whether particular rules were rejected as unjustifiable "new" extensions of existing standards or accepted as predictable "old" applications of such standards. *Cf. Butler, id.* at 4296; *Parks, id.* at 4323 (*Teague* validates "reasonable, good-faith interpretations of existing precedents made by state courts"). When state courts approved the *Caldwell* rule, their consensus provided evidence that *Caldwell* was dictated by existing constitutional principles, as a necessary safeguard for the accuracy of death verdicts.

The states' endorsement of the *Caldwell* rule should be treated as particularly weighty evidence of its old law status because a pattern of consensus is hard to come by in the realm of constitutional interpretation. Reasonable state rejections of rules may signify that precedents either are in conflict or provide no direct guidance on a question. Compare *Butler, id.* at 4297 (where precedents concerning the *Roberson* rule could be interpreted differently) with *Parks, id.* at 4323-4324 (where precedents did not speak directly to the rule at issue). But state rejections of rules may also simply reflect the fact that existing constitutional standards are somewhat unclear, as is often the case. See *Butler, id.* at 4296 (state courts sometimes have difficulty ascertaining evolving constitutional standards, citing *Teague*, 109 S. Ct. at 1075, citing *Brown v. Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring in result)). Thus when state courts join together to support a rule, their agreement must be impelled by the confidence that the relevant standards are especially clear in supporting that rule.

The state consensus endorsing the *Caldwell* rule not only demonstrates that state courts would have regarded that rule as dictated by the precedents, but also provides evidence of the old law status of *Caldwell* in a second way. *Teague's* non-retroactivity principle is based on the premise that state courts interpret constitutional standards with habeas review in mind. See *Butler, id.* at 4296 and *Parks, id.* at 4323. In faithfully applying those standards, state courts assume that retroactive treatment will be given to rules that are required by those standards, once those rules are ratified by this Court. Thus state court endorsements of rules are made with the expectation that the endorsed rules will be retroactive, while state rejections of rules are made with the opposite expectations. *Cf. Butler, id.* When state courts joined together to endorse the *Caldwell* rule, their consensus reflected an expectation that *Caldwell* would become part of the constitutional *status quo*, and as such, applied retroactively.

No doubts can be raised about the efficacy of the incentive that is created by retroactive usage of the *Caldwell* rule, because that rule was widely accepted by state courts that addressed the *Caldwell* problem. Where state rejections of rules reveal that Supreme Court ratification of those rules was unpredictable at best, this suggests that retroactive usage of the rules can create no deterrent effect, because state courts cannot be expected to conduct their proceedings in a manner consistent with unpredictable constitutional developments. See *Butler, id.* at 4296 (citing *United States v. Leon*, 468 U.S. 897, 918-919 (1984)). Yet where state court endorsement of rules occurs, the opposite should be true—the state courts can be expected to respond to the incentive provided by retroactive usage of those rules.

The state rulings endorsing the *Caldwell* rule provide clear evidence that the state courts did respond to the

incentive of this Court's predictable ratification of the *Caldwell* rule and to the prospect of its retroactive usage. There are no reasonable, good-faith, pre-*Caldwell* state court rejections of the *Caldwell* rule that require "validation" through non-retroactive treatment of *Caldwell*. See *Butler*, *id.* at 4296 and *Parks*, *id.* at 4323. The first step of the *Teague* "new law" inquiry must lead to the conclusion that the state court rulings preceding this Court's adoption of *Caldwell* support Robert Sawyer's argument that the *Caldwell* rule is old law.

B. This Court's Eighth Amendment Precedents Could Be Read Only To Support The Adoption Of The *Caldwell* Rule, And Reasonable State Courts Would Have Regarded *Caldwell* As Compelled By Those Precedents.

Under the second step of a *Teague* "new law" inquiry, *Butler* and *Parks* dictate an examination of this Court's Eighth Amendment precedents, in order to determine whether they provide independent evidence that *Caldwell* was old law. See *Butler*, 58 U.S.L.W. at 4296-4297; *Parks*, 58 U.S.L.W. at 4323-4324. Accord, *Penry v. Lynaugh*, 489 U.S. ___, 109 S.Ct. 2934, 2944-2947 (1989). The Eighth Amendment precedents that produced *Caldwell* do satisfy the functional test for old law rules, as state courts "would have felt compelled by existing precedent to conclude" that *Caldwell* was constitutionally required. *Parks*, *id.* at 4323.

This Court's Eighth Amendment precedents demonstrate that *Caldwell* is a model of an old rule that predictably extended the reasoning of prior cases. See *Butler*, *id.* at 4296 and *Parks*, *id.* at 4323 (noting that there is no bright-line boundary between old law rules that predictably "extend the reasoning of prior cases" and new law rules that do so in a way that disqualifies them for retroac-

tive usage). Specifically, the *Caldwell* precedents contain two ingredients that are vital to show that a rule is old law under *Butler* and *Parks*. First, *Caldwell*'s precedents cannot be read to support the opposite result from that reached in *Caldwell*. Second, the precedents provided guidance concerning the *Caldwell* problem by speaking directly to the constitutional vice that the *Caldwell* rule seeks to correct.

In order to understand why *Caldwell*'s precedents could not be read to produce the opposite result, and why this shows that *Caldwell* was old law, the *Caldwell* precedents must be compared to those underlying the *Roberson* rule. That rule was held in *Butler* to be new law, in part, because its precedents looked in two directions. See *Butler*, *id.* at 4297 (where precedents can support two results, the rule is susceptible to debate among reasonable minds and is new law). *Roberson* created a *per se* rule about Fifth Amendment waivers that was exceptional compared to the ordinary case-by-case approach applied everywhere but in the specific circumstances defined by *Edwards v. Arizona*, 451 U.S. 477 (1981). Compare *Roberson*, 486 U.S. at 680-688 with *id.* at 689-693 (Kennedy, J., dissenting). *Edwards* lent itself to competing interpretations, as evidenced by the deep state court division over the implications of its holding. See cases cited in *Roberson*, 486 U.S. at 679-680 n.3. State courts also perceived the Supreme Court's case-by-case waiver holdings as signalling the need to reject *Roberson*'s *per se* approach. See *id.* Cf. *Solem v. Stumes*, 465 U.S. 638, 647-650 (1984) (finding *Edwards* to be new law based, in part, on state court division over its necessity).

By contrast, the *Caldwell* precedents contain no contradictory signals that could have supported the state courts' rejection of the *Caldwell* rule, and the state court

decisions on the *Caldwell* problem bear this out. See Brief for Petitioner at 18-22 & nn. 4 & 6. State courts did not find, in the pre-*Caldwell* era, that any Eighth Amendment precedent signalled the need to reject *Caldwell*, or even that *Caldwell* was debatable under the precedents. This result is not surprising, considering the consistent pattern of reasoning in a variety of Eighth Amendment cases supporting the *Caldwell* result. See Brief for Petitioner at 12-29. Under *Butler*, *Caldwell*'s retroactive usage is needed because the *Teague* "incentive" does operate upon state courts when rules are compelled by precedents that consistently point toward the necessity for a particular rule. See *Butler*, *id.* at 4296 (*Teague* hold that the scope of the new law concept should be defined by references to policies such as the incentive function of habeas).

Caldwell's precedents also provided the guidance necessary under *Parks* to show state courts that the *Caldwell* rule should be adopted. See *Parks*, *id.* at 4323-4324 (when precedents do not "speak directly, if at all" to a claim, it is new law.) The *Parks* Court found that precedents could not provide clear guidance for state courts faced with a claim that a *per se* ban on the anti-sympathy instruction was necessary under the Eighth Amendment. See *Parks*, *id.* at 4323-4324 (analyzing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). *Parks* presented a problem concerning the jury's discretion in weighing evidence, not the problem of preclusion of the jury's power to consider mitigating evidence that is governed by *Lockett* and *Eddings*. *Parks*, *id.* at 4323, 4324. In addition, the *Parks* claim conflicted with precedents concerning both "weighing" problems and the need to curb the vagaries of emotional juror responses to evidence. *Id.* at 4324. Depending on their view of the law,

state courts could conclude either that, as in *Butler*, there were conflicting signals in the precedents, or that the precedents left them entirely in the dark. See state cases cited in *Parks*, *id.* at 4323 (where most state courts reached one of these two conclusions).

The *Caldwell* precedents did not leave the state courts in the dark concerning the need for the *Caldwell* rule as a matter of Eighth Amendment law. These precedents were free of contradictory signals, and two sets of principles spoke directly to the *Caldwell* problem. The *Caldwell* problem presented the question whether false and misleading information could be presented safely to a sentencing jury, when this not only affronted the jury's need for reliable sentencing information, but created the risk that the jurors would not consider mitigating evidence because they had been misinformed that this responsibility could be abdicated to an appellate court. The rulings in *Gardner v. Florida*, 430 U.S. 349 (1977), *California v. Ramos*, 463 U.S. 992 (1983) and *Zant v. Stephens*, 462 U.S. 862 (1983), as well as *Lockett* and *Eddings*, spoke directly to this question. See Brief for Petitioner at 12-29.

As *Parks* points out, *Penry* demonstrates that state courts are expected to read Eighth Amendment precedents together, to construct the clear connections that lie between them, and to understand the clear implications that follow from their reasoning, even though the principles they establish may be created in a piecemeal fashion. See *Parks*, *id.* at 4324 (reasonable state courts should have understood that *Lockett* and *Eddings* reaffirmed the reasoning of *Jurek v. Texas*, 428 U.S. 262 (1976), and should have connected all three cases together as compelling the *Penry* result). The *Caldwell* precedents created a connected foundation for the *Caldwell* rule, which reason-

able state courts would have regarded as evidence that the rule was compelled by the precedents. The actual state court endorsement of the *Caldwell* rule shows that these courts found no ingredient in the precedents that justified rejection of, or even doubt about, the necessity for the rule.

Under *Parks* and *Butler*, *Caldwell* is old law because reasonable state courts would have regarded it as compelled by the precedents under *Teague*. Retroactive usage of *Caldwell* will serve *Teague*'s guarantee that habeas review will insure that state courts conduct their proceedings in accordance with old law rulings that interpret the Constitution in highly predictable and reasonable ways.

C. When State Court Decisions Endorsing *Caldwell* Are Based On Federal Law Or On State Law That Is Informed By Federal Principles, Those State Decisions Are Relevant Evidence That *Caldwell* Is Old Law Under *Teague*.

Teague dictates that the state courts' perspective must be used to determine whether a rule was compelled by federal precedents, and this means that traditional sources of federal law interpretation used by state courts must be considered in determining whether state courts reasonably would have regarded *Caldwell* as old law. In the pre-*Caldwell* era, state courts faced with the *Caldwell* problem would have relied on all the state court decisions endorsing *Caldwell* that were based on federal law or on state law that was informed by federal principles. Therefore Respondent is wrong to argue that state court endorsements of *Caldwell* are irrelevant to the *Teague* inquiry because they rely on "jurisprudential developments on the state level." Brief for Respondent at 19.

The reasoning used in the state court decisions adopting *Caldwell* reveals the use of federal principles combined with the principles developed in the pre-*Furman* era, when it was the state courts who were the chief guarantors of due process rights in the capital trial process. *Furman v. Georgia*, 408 U.S. 238 (1972). After *Furman*, this earlier body of principles remained a natural source of first resort for state courts who were charged with the responsibility of developing procedures to curb the arbitrary infliction of the death penalty. Not surprisingly, *Caldwell* adoptions in Georgia and Louisiana after *Furman* reflected the use of earlier state court principles, as well as the Eighth Amendment principle approving the appellate review of death verdicts in order to reverse those that were influenced by arbitrary factors. See *Gregg v. Georgia*, 428 U.S. 153 (1976). The pre-*Furman* state court consensus held that *Caldwell* violations created unreliable death verdicts by lessening the jury's sense of responsibility for the finality of its verdict.

There was a rich variety of sources supporting adoption of the *Caldwell* doctrine, as illustrated in the opinions of state courts that adopted the *Caldwell* rule as part of their Eighth Amendment review of death verdicts for arbitrary factors. See *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977), and *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37, 40 (1977), *cert. denied*, 444 U.S. 885 (1979) (relying on *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365, 367-368 (1975), which borrowed the *Caldwell* rule from A.B.A. Standards, early Georgia precedents, and the pre-*Furman* death penalty law of other states); see *State v. Willie*, 410 So.2d 1019, 1033-1035 (La. 1983), *cert. denied*, 465 U.S. 1051 (1984), and *State v. Robinson*, 421 So.2d 299, 233-234 (La. 1982) (relying on *State v. Berry*, 391 So.2d 406, 418-421 (La. 1980), *cert. denied*, 451 U.S.

1010 (1981), which borrowed the *Caldwell* rule from post-*Furman* adoptions of *Caldwell* in Georgia, North Carolina, and South Carolina cases, and from the pre-*Furman* death penalty law of other states).

In turn, these state court opinions spawned further state adoptions of *Caldwell*. See, e.g., *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky.) cert. denied, 469 U.S. 860 (1984) (relying on Louisiana's *Willie* and Kentucky precedent), and *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (relying on Georgia's *Hawes*, Louisiana's *Willie*, and post-*Furman* South Carolina adoptions of *Caldwell*); see *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979) (relying on Georgia's *Hawes*, *Fleming* and *Prevatte*, and on pre-*Furman* death penalty law of other states), and *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559, 566 (1979) (relying on same sources). See also *Poole v. State*, 290 Md. 114, 48 A.2d 434 (Ct. App. 1981) (approving *Caldwell* rule in dicta for use in future cases, relying on Louisiana's *Berry*, South Carolina's *Gilbert*, post-*Furman* adoption of *Caldwell* in North Carolina, and Maryland precedent); *Irvin v. State*, 617 P.2d 588, 599 (Okla. Ct. Crim. App. 1980) (approving *Caldwell* in dicta relying on Georgia's *Prevatte*).

As this Court's precedents dictating acceptance of the *Caldwell* rule continued to accumulate, state courts could make use of more Eighth Amendment law in adopting *Caldwell*. See *Williams v. State*, 445 So.2d 798, 811-812 (Miss. 1984), cert. denied, 469 U.S. 1117 (1985) (relying on *Ramos* to find that information about appellate review must be accurate, on post-*Furman* Mississippi adoption of *Caldwell*, and pre-*Furman* Mississippi precedent). Cf. Brief for Petitioner at 12-29 (describing the accumulating federal precedents that dictated the *Caldwell* rule.) State courts that already had adopted *Caldwell* were able to

cite their earlier decisions as precedents for maintaining a rule that enjoyed continuing and undebatable support from evolving federal law. See, e.g., *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), cert. denied sub nom. *Arnold v. South Carolina*, 467 U.S. 1265 (1984) (reversing a death verdict and relying on post-*Furman* South Carolina adoptions of *Caldwell*); *State v. Woomer*, 276 S.C. 258, 277 S.E.2d 696, 701-702 (1981), cert. denied, 463 U.S. 1225 (1983) (same).

State court usage of the *Caldwell* decision reveals that these courts understood that their pre-*Caldwell* adoptions of the *Caldwell* rule were informed by federal principles. The state courts did not treat the holding as one that surprised them. Those courts that already had adopted the *Caldwell* rule treated this Court's decision as a ratification of the principles they had used to solve the *Caldwell* problem. When *Caldwell* claims arose, the *Caldwell* opinion was cited interchangeably with pre-*Caldwell* state court rulings, and those state rulings remained in use as illustrations of proper Eighth Amendment applications of the *Caldwell* rule. See, e.g., *Dean v. Commonwealth*, 777 S.W.2d 900, 906, 907 (Ky. 1989), cert. denied, ___ U.S. ___, 109 S. Ct. 1546 (1989) (reversing death verdict for *Caldwell* violation); *Tamme v. Commonwealth*, 759 S.W.2d 51, 52 (Ky. 1988) (same); *Holland v. Commonwealth*, 703 S.W.2d 876, 880 (Ky. 1985) (same); *State v. McCoy*, 323 N.C. 1, 372, S.E.2d 12, 16 (1988), cert. granted and judgment vacated, ___ U.S. ___, 1989 WL 115354 (March 26, 1990) (finding no violation); *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470, 499 (1989), cert. granted and judgment vacated, ___ U.S. ___, 110 S. Ct. 1466 (1990) (same); *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442, 450 (1988) (same); see also Louisiana cases cited in Brief for Petitioner at 22 n.7. Pre-*Caldwell* state cases

adopting the *Caldwell* rule were even used in states that had been given no occasion to adopt the *Caldwell* rule earlier. See, e.g., *State v. Rose*, 112 N.J. 454, 548 A.2d 1058, 1089 (1988) (reversing death verdict for *Caldwell* violation); *Riley v. State*, 496 A.2d 997, 1024 (Del. 1985), cert. denied, 478 U.S. 1022 (1986) (finding no violation).

A reasonable state court would have regarded the pre-*Caldwell* state adoptions of the *Caldwell* rule as helpful sources for interpreting the Eighth Amendment's requirement, because these adoptions were based on federal law and on state law that was informed by federal principles. These state rulings are not grounded in narrow statutory concerns that are unique to particular states. Compare *Ramos*, 463 U.S. at 1013 n.30 (finding that such narrowly-grounded state law holdings do not necessarily inform the making of federal constitutional law). Nor do the state court adoptions of *Caldwell* bear the earmarks of decisions that attempt to guarantee greater protection under state law than is recognized as existing under federal law. Rather, these rulings demonstrate state courts' sensitivity to their obligations to anticipate this Court's Eighth Amendment rulings. Under *Teague*'s "new law" inquiry, these rulings must count as evidence that reasonable state courts would, and did, regard *Caldwell* as old law in the pre-*Caldwell* era.

II. THE CALDWELL RULE SHOULD BE RETROACTIVE UNDER BUTLER AND PARKS BECAUSE IT DOES NOT THREATEN THE ACCURACY OF DEATH VERDICTS, AND INSTEAD GUARANTEES THAT THEIR ACCURACY IS NOT DISTORTED BY JURORS' MISUNDERSTANDING OF THEIR ROLE AS THE FINAL ARBITERS OF DEATH.

Butler and *Parks* affirm that *Teague* provides that "new law" rules that qualify under its fundamental fairness

standard will be applied retroactively. *Butler*, 58 U.S.L.W. at 4297; *Parks*, 58 U.S.L.W. at 4325. These decisions also reveal that rules that threaten the accuracy of death verdicts cannot qualify for retroactive application under this *Teague* standard. *Butler*, id. (*Roberson* rule does not qualify for *Teague* exception because its violation does not diminish the likelihood of obtaining accurate convictions); *Parks*, id. (*Parks* rule does not qualify because the accuracy of death sentences is likely to be threatened by its use).

By contrast, violations of the *Caldwell* rule diminish the likelihood of obtaining accurate death sentences, as explained in Petitioner's Brief. See Brief for Petitioner at 30-40. As *Parks* notes, the contours of the fundamental fairness exception are illustrated by the examples of the qualifying rights that are cited in *Teague*. *Parks*, id. at 4325. *Caldwell* fits within these contours for all the reasons described in Petitioner's Brief, as it guarantees that the accuracy of death verdicts will not be distorted by jurors' misunderstanding of their role as final arbiters of death.

III. THIS COURT SHOULD NOT ABANDON CALDWELL'S CORRECTION STANDARD, WHICH HOLDS THAT WHEN PROSECUTORS VIOLATE CALDWELL, THE JURY MUST BE GIVEN INFORMATION THAT CORRECTS THE IMPRESSION THAT THE APPELLATE COURTS WILL BE FREE TO REVERSE THE DEATH SENTENCE IF THEY DISAGREE WITH THE JURY'S CONCLUSION THAT DEATH WAS APPROPRIATE.

Respondent seeks to have this Court modify the correction standard for *Caldwell* violations. This proposal is not supported by persuasive authority, and it is not a good idea. In place of *Caldwell*'s bright-line rule, Respondent

would substitute a test that would make it difficult for lower courts to know when proper correction of a violation occurs. *Caldwell's* correction standard is being applied correctly by lower courts, and it should be reaffirmed. Relief must be granted in those rare cases where clearly false and misleading statements about the non-finality of the jury's death verdict are made, and where the jury is not given information that will

correct the impression that [an] appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate.

Caldwell, 472 U.S. at 343 (O'Connor, J., concurring). Robert Sawyer should be given a resentencing hearing because his prosecutor's statements in closing argument violated *Caldwell* and because no correction occurred in his case.

Caldwell's correction standard is based on the premise that once a *Caldwell* violation occurs, some express contradiction of the prosecutor's false and misleading statements is needed in order for the capital sentencing jury to understand its responsibilities. The standard for a *Caldwell* violation itself is a demanding one: statements must be "false and misleading", and "focused, unambiguous and strong", and must relate to the power of other authorities to review or correct a jury's death verdict. See Brief for Petitioner at 9 (describing relevant *Caldwell* requirements). Once these kinds of false and misleading statements are made, *Caldwell* holds that "other remarks to the effect that the jury [is] responsible for sentencing [cannot] cure the prejudicial effect of [a] prosecutor's improper argument." *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267, 286 (1986). Respondent offers examples of these kinds of insufficient remarks to show that

Caldwell's correction standard is satisfied. See Brief for Respondent at 33-37 & Appendix B and C. In effect, Respondent would have this Court modify *Caldwell's* correction standard.

The authorities cited by Respondent do not support the proposition that general remarks about the jury's responsibility should be held to cure a *Caldwell* violation. This Court has been careful to distinguish the *Caldwell* doctrine from that used to assess generic prosecutorial mistakes. See *Darden v. Wainwright*, 477 U.S. 168, 183-184 n.15 (1986). Cf. *Boyde v. California*, ___ U.S. ___, 58 U.S.L.W. 4301, 4305-4306 (March 5, 1990) (relying on *Darden* standard); *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir. 1986) (*en banc*), cert. denied, 480 U.S. 911 (1987) (relying on *Darden* standard in a case involving *Darden* error that is mislabelled as *Caldwell* error). See Brief for Respondent at 31-32, 38-40, 42 (arguing that *Boyde*, *Tucker* and *Darden* standards should be used as the *Caldwell* correction standard).

This Court should retain the *Caldwell* correction standard because a more lenient standard was properly rejected in *Caldwell*, as such a standard would not require express contradiction of the false and misleading statements made to the jury about appellate court powers. Moreover, the *Caldwell* correction standard is a straightforward one, and is being applied correctly by the lower courts. See, e.g., *People v. Drake*, 748 P.2d 1237, 1258-1260 (Colo. 1988) (granting *Caldwell* relief); *Frye v. Commonwealth*, 231 Va. 201, 345 S.E.2d 267, 286 (1986) (same); *State v. Clark*, 492 So.2d 862, 870-871 (La. 1986) (same). See also federal cases cited in Brief for Petitioner at 49. The Respondent's proffered correction standard would make it more difficult for lower courts to know when a *Caldwell* error was cured, as long as an unpredic-

table number of general comments about jury responsibility would suffice for correction.

Caldwell was correctly decided and is proving to be easy for lower courts to enforce. There is no need to modify it. Robert Sawyer's prosecutor made false and misleading statements that meet *Caldwell's* strict standards, and because those statements were not corrected, a resentencing hearing should be granted.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Brief for Petitioner, the judgment below should be reversed and Petitioner's case should be remanded with instructions to grant the writ of habeas corpus with regard to the provision of a resentencing hearing.

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No. 89-5809

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF
THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE

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BRIEF OF
THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE

On consent of the parties, the American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* in support of the retroactive consideration of the petitioner's claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). ^{1/}

^{1/} The consents of the parties are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The ABA is a voluntary, national membership organization of the legal profession with more than 365,000 members in all states and territories and the District of Columbia. The ABA includes prosecutors, public defenders, private lawyers, trial and appellate judges of state and federal courts, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates.

Believing the issue to be fundamental to a more just system of capital punishment, the ABA submits this brief to set forth its view as to the correct construction of the "fundamental fairness" exception to the doctrine of *Teague v. Lane*, 109 S. Ct. 1060 (1989) in the capital sentencing context. The ABA believes it has unique experience to bring to bear on that issue, at two levels.

First, the ABA recently completed an intensive, year-long study of the process of post-conviction review of capital convictions and sentences. Presupposing the continued existence of both capital punishment and federal habeas corpus, the study undertook to formulate concrete recommendations which would enhance the efficiency and fairness of state and federal review procedures.

This study was conducted by the ABA Task Force on Death Penalty Habeas Corpus ("ABA Task Force"), composed of individuals with a wide range of experience and perspectives: state and federal judges, government and defense capital post-conviction lawyers, a court administrator and academicians. The ABA Task Force held public hearings in Atlanta, Dallas, and San Francisco and heard from more than eighty knowledgeable witnesses from all corners of the criminal justice process. Among the topics studied by the ABA Task Force were the doctrine of *Teague v. Lane* and the scope of the two exceptions recognized by *Teague* to its general rule of non-retroactivity on federal collateral review. *Toward a More Just and Effective System of Review in*

State Death Penalty Cases: Recommendations and Report of the American Bar Association on Death Penalty Habeas Corpus, 315-325 (October 1989) (hereinafter referred to as the "ABA Task Force Report").

The work of the Task Force culminated in the adoption of a set of recommendations by the Council of the ABA's Criminal Justice Section. On February 13, 1990, those recommendations, including one which specifically addressed the construction of the "fundamental fairness" exception to *Teague*, were adopted by the ABA House of Delegates.^{2/}

In addition to its special knowledge of the process of federal habeas review in capital cases, the ABA is also singularly situated to comment on the fundamental nature of the constitutional principle enunciated in *Caldwell*. The ABA has long played a leading role in promoting standards of professional conduct fundamental to the fairness of our system of adjudication. See, e.g., ABA Standards for Criminal Justice; ABA Model Code of Professional Responsibility and Code of Judicial Conduct; ABA Model Rules of Professional Conduct. The ABA has specifically been concerned about protecting the integrity of the jury's central function in criminal cases.

^{2/} Resolution 115E, adopted by the ABA House of Delegates on February 13, 1990 at its Mid-Year Meeting. Copies of the resolution and the supporting Report and Recommendations of the Criminal Justice Section to the ABA House of Delegates (hereinafter referred to as the "ABA CJS Report and Recommendations") have been lodged with the Clerk of the Court. Paragraph 15 of Resolution 115E states:

The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

ABA CJS Report and Recommendations, 4.

The ABA has expressed that concern in standards which, among other things, govern prosecutorial argument to the jury. As early as 1971, the ABA stressed that "[r]eferences to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision." See ABA Standards For Criminal Justice, 3-5.8 (2d ed. 1980); see also ABA Project on Standards for Criminal Justice: Standards Relating to the Prosecution Function and the Defense Function, 3-5.8, Commentary p. 129 (App. Draft 1971). This Court relied in part on the ABA standard in endorsing the rule under which Sawyer now seeks reversal of his death sentence. See *Caldwell*, 472 U.S. at 334 n.6.

SUMMARY OF ARGUMENT

This Court should construe the "fundamental fairness" exception announced in *Teague* to permit death-sentenced habeas petitioners to receive the benefit of those new constitutional rules without which the likelihood of an accurate sentencing judgment is seriously diminished. The focus of the test should be on the effect of the rule in assuring the integrity of the capital sentencing process, rather than on the factual innocence of particular petitioners.

The Eighth Amendment rule established in *Caldwell* is fundamental to the integrity of the capital sentencing process. Where a jury may have been misled by prosecutorial remarks which produce a pro-death bias and distract the jury from giving a "reasoned moral response" to the evidence, *Penry v. Lynaugh*, 109 S. Ct. 2934, 2947 (1989) (emphasis in original), confidence in the reliability of the death sentence is seriously diminished. Thus, *Caldwell* should be retroactively applied under the second exception to *Teague*.

ARGUMENT

I

UNDER *TEAGUE*'S "FUNDAMENTAL FAIRNESS" EXCEPTION, DEATH-SENTENCED HABEAS PETITIONERS SHOULD RECEIVE THE BENEFIT OF NEW RULES WHICH UNDERMINE CONFIDENCE IN A CAPITAL JURY'S SENTENCING PROCESS

The Proper Standard

In its study of federal habeas review, the ABA gave considerable thought to the proper interpretation of the general rule of non-retroactivity announced in *Teague v. Lane*, and specifically solicited the views of numerous recognized experts about what the second of *Teague*'s two exceptions ought to mean.

The second exception covers those new rules ^{3/} which alter the Court's view of the "fundamental fairness of the trial" and significantly improve its accuracy. *Teague*, 109 S. Ct. at 1076. In defining the second exception, *Teague* combined two principles: (1) that new law should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" *Teague*, 109 S. Ct. at 1073 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)); and (2) that the "likely accuracy of convictions" is relevant to the scope of habeas review, *Teague*, 109 S. Ct. at 1076.

In conducting its study, the ABA recognized that the Court has not yet resolved the question of how the "fundamental fairness" exception of *Teague* should be applied to the sentencing phase of capital trials. See ABA Task Force Report, 321-23. ^{4/}

^{3/} This brief does not address the threshold question of whether *Caldwell* represents a "new rule" for *Teague* purposes.

^{4/} *Teague* was not a capital case. In *Penry*, the Court held that *Teague* applied to capital cases, but the Court had no occasion to interpret the "fundamental fairness" exception in that context.

To address that question, and others, the ABA Task Force heard from more than eighty witnesses in its public hearings — including a state governor, a United States Senator, state legislators, federal trial and appellate judges, state supreme court judges, state attorneys general and their staff, prosecuting attorneys, state and federal public defenders, directors of death penalty resource centers, volunteer post-conviction counsel, representatives of victims' rights organizations, professors and others.

Based on its analysis of the vast amount of information collected during its study of the area, the ABA recommends that *Teague's* "fundamental fairness" exception be construed to mean that "any claim that undermines a court's confidence in the . . . sentencing determination in a capital case shall be governed by the law at the time the court considers the petition [for habeas relief]." ABA CJS Report and Recommendations, 51.

The Need for Heightened Scrutiny of Capital Sentencing Procedures

Underlying the ABA's recommendation is the time-honored principle, often expressed by this Court, that "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . ." ABA Task Force Report, 344. This Court has repeatedly held that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (citing numerous prior cases).

The principle of heightened scrutiny for capital sentencing phase procedures which has pervaded this Court's jurisprudence in the years since *Furman v. Georgia*, 408 U.S. 238 (1972), is no transient phenomenon. For as long as death has been an available penalty under Anglo-American law, capital sentences have been reviewed with special concern and the courts have followed the rule of parsing the record *in favorem vitae*, or in favor of life.

See L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 83-106 (Stevens & Sons, Ltd. 1948).

The Continuing Evolution of Fundamental Capital Sentencing Rules

In addition to the well-established tradition of interpreting penalty phase procedures *in favorem vitae*, the ABA's recommendation is based upon a recognition that the interpretation of the Constitution in this area is still evolving. ABA CJS Report and Recommendations, 50. "Because this area of law is a relatively new one, the Supreme Court still regularly announces rules which are designed to insure basic fairness in capital sentencing." *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. of the Assoc. of the Bar of The City of New York, 848, 863 n.43 (1989).

When this Court predicted that the "fundamental fairness" exception to *Teague* would be a narrow one, in part because it is "unlikely that many . . . components of basic due process have yet to emerge," *Teague*, 109 S. Ct. at 1077, it was speaking of the guilt-innocence determination, not the capital sentencing determination.^{5/}

We turn now to an examination of how our proposed standard should be applied in practice.

^{5/} Moreover, at the time those words were written, *Caldwell* had already been decided and the rule of *Caldwell* had already taken its place among the "components of basic due process," *Teague*, 109 S. Ct. at 1077.

II

IN APPLYING THE "FUNDAMENTAL FAIRNESS" EXCEPTION, THE COURT SHOULD FOCUS ON THE INTEGRITY OF THE CAPITAL SENTENCING PROCESS, NOT ON THE FACTUAL INNOCENCE OF PARTICULAR PRISONERS

In concluding that those new rules which undermine confidence in the jury's sentencing judgment in a capital case should be retroactively applied, the ABA determined that *Teague's* "fundamental fairness" exception should be used to protect the integrity of the process by which the death sentence was imposed, and not simply to guard against the execution of persons either innocent of the crime or somehow "innocent" of the death penalty. In other words, once a capital trial has reached the "selection stage" at which "[w]hat is important . . . is an individualized determination [of sentence] on the basis of the character of the individual and the circumstances of the crime," *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis omitted), the focus of the second *Teague* exception should be on the nature of any constitutional error and its tendency to subvert the process of individualized sentencing choice.

The Jury's Capital Sentencing Decision Is Qualitatively Different from a Decision on Guilt or Innocence

The focus of the Fifth Circuit majority on whether Sawyer had shown "factual innocence" or "actual prejudice" was misplaced. At the sentencing phase, a capital jury must do something very different from what it did at the guilt-innocence phase. The jury must make a sentencing *judgment*, not simply find facts. It must make a reasoned *moral* response to the evidence, not decide whether particular elements have been proved or determine any "similar 'central issue' [of fact]," *Ramos*, 463 U.S. at 1008. To dis-

charge this function, it must correctly understand the nature of its responsibilities.

All defendants who have been lawfully convicted — and are not covered by *Teague's* first exception — are, by definition, eligible for death once they reach the selection stage.^{6/} The jury cannot make a "wrong" decision since death is, at that stage, always a permissible punishment. It is therefore meaningless to ask whether a *convicted* defendant who has reached the selection stage is "actually innocent" of the death penalty.

While the jury may be asked to find certain facts relating to the existence of aggravating or mitigating factors, its ultimate sentencing choice remains discretionary. As the Court said in *Caldwell*, the jury's decision to punish by death is a "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Caldwell*, 472 at 340 n.7 (quoting *Zant*, 462 U.S. at 900 (Rehnquist, J., concurring in judgment)). This Court has stressed that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry*, 109 S. Ct. at 2947 (emphasis in original). No appellate court, therefore, can determine whether the jury was "right" or "wrong" to choose death, or determine what a jury would have done in an untainted sentencing proceeding. It can only inquire into the fundamental fairness of the process by which the result was reached.

^{6/} Rules which defeat death eligibility, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977), would fall within *Teague's* first exception. See *Penry*, 109 S. Ct. at 2953. Under that exception, a new rule will be retroactive if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 109 S. Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.)). As this Court has subsequently explained, the first exception covers not only rules forbidding criminal punishment of certain primary conduct, but also rules prohibiting the death penalty for a class of defendants because of their status or offense. *Penry*, 109 S. Ct. at 2953.

For this reason, the ABA concluded after extensive consideration that the appropriate inquiry for a court faced with the question of whether a particular constitutional claim arising out of the capital sentencing process falls within the "fundamental fairness" exception to *Teague* should be: whether the constitutional rule invoked by the claim is one whose violation predictably lessens the integrity of sentencing determinations.

*The Inappropriateness of
the Fifth Circuit Standard*

The Fifth Circuit properly acknowledged that errors which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all," *Sawyer v. Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989), fall within *Teague*'s second exception. The court gave as an example of such an error a jury verdict rendered in fear of mob rule. *Id.* (relying on *Teague*, 109 S. Ct. at 1077). The Fifth Circuit, however, failed to recognize that *Caldwell* error is also of precisely that type: although the facts of a case may have been presented to the jury, it was prevented by misleading prosecutorial argument from rendering an undistorted sentencing judgment. *Cf. Hitchcock v. Lagger*, 481 U.S. 393, 398-99 (1987); *Penry*, 109 S. Ct. at 2951. Indeed, as is discussed in greater detail in Part III of this brief, it is exactly because *Caldwell*-type arguments distort the jury's decision-making process that the ABA long ago concluded that such arguments by prosecutors should be impermissible.

The Fifth Circuit majority justified its conclusion that *Caldwell* does not satisfy *Teague*'s second exception by relying on *Dugger v. Adams*, 109 S. Ct. 1211 (1989). In *Adams*, this Court found that because Adams could not show that he was "actually innocent" of the death sentence, a refusal to consider his procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice." *Id.* at 1218 n.6. Importing this "actual innocence" standard into *Teague*'s retroactivity analysis, the Fifth Circuit wrote:

It is difficult to see why a *Caldwell* violation would be sufficiently fundamental to require an exception to the 'new rule' doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Sawyer, 881 F.2d at 193-94.

The suggested parallelism between the non-retroactivity doctrine of *Teague* and the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), is inapposite. The two doctrines have different purposes, which justify — indeed, mandate — different analyses in their application.

In *Sykes* this Court held that habeas petitioners must show "cause" and "prejudice" before the federal courts will review claims that the state courts have procedurally barred. The rationale of *Sykes* is that state procedural rules are specifically designed to expose and correct errors — to enable the state courts to "mend their own fences," *Engle v. Isaac*, 456 U.S. 107, 129 (1982) — and that the federal courts should encourage these efforts by refusing to undermine them on federal habeas corpus. Accordingly, when a federal habeas court is asked to review a defaulted state claim, it must investigate the reason for the default in order to determine whether the prisoner has made a compelling case that he should be excused from compliance with the state's generally applicable procedural rules.

Assuming that the prisoner was represented by competent counsel, the fact that a constitutional error is shown to have occurred without objection is presumed to indicate that it had no adverse impact on the prisoner's case — that the case rather presents the situation of a party declining to invoke a theoretical right because it is of no practical consequence under the circumstances or for strategic reasons. *See Henry v. Mississippi*, 379 U.S. 443 (1965); *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984). Correlatively, the presumption is strong that if an objection *had* been made, the error would have been corrected. The state is enti-

tled to rely on the assurance that it will not later be sandbagged by errors it never had a chance to correct.

These considerations have been held to permit only a narrow exception to the *Sykes* procedural-bar rule: one to avert a "fundamental miscarriage of justice." To come within this exception, a habeas petitioner must make a compelling showing that his failure to raise appropriate objections did not unfairly prejudice the state and that the unobjected-to error *did* prejudice him by producing an unwarranted result. Unsurprisingly, such a showing may be tantamount to a colorable demonstration of actual innocence. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

The purpose of the non-retroactivity doctrine of *Teague* is very different than the purpose of the procedural bar rule. *Teague* deals with the situation in which the constitutional principle invoked by a habeas petitioner was not recognized at the time of trial, so that the petitioner's failure to invoke it then neither signified the harmlessness of the proceedings nor deprived the state of a chance to correct them. *Teague* is designed to promote the even-handed enforcement of constitutional rights and the legitimate reliance of the states upon the stability of legal rules by denying retroactive effect to new rules unless their nature compels it. For this purpose, an inquiry into the "actual innocence" or "actual innocence of the death penalty" of each particular federal habeas petitioner who claims the benefit of a supervening constitutional ruling would be irrelevant. The relevant inquiry should rather be whether the risk of harm to constitutional interests recognized by the supervening ruling does or does not outweigh the states' reliance interest in a previous and less protective rule of law for all cases of a given vintage. In the case of capital sentencing, this inquiry requires an examination of whether the new rule is basic to assuring that the jury's sentence will represent its "reasoned moral response" to the defendant and his conduct. *Penry*, 109 S. Ct. at 2947; see also *Franklin v. Lynaugh*, 108 S. Ct. 2320, 2333 (1988) (O'Connor and Blackmun, JJ., concurring in judgment).

III

THE RULE OF *CALDWELL* IS FUNDAMENTAL TO THE INTEGRITY AND ACCURACY OF THE CAPITAL SENTENCING PROCESS AND THUS QUALIFIES FOR EXCEPTION UNDER *TEAGUE*

In *Caldwell*, the Court held that where a prosecutor's argument incorrectly leads a sentencing jury to believe that the responsibility for determining the appropriateness of a death sentence rests with appellate judges, rather than the jury, the resulting capital sentence is inconsistent with the Eighth Amendment's recognition of the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

The ABA has long been involved in evaluating the impact of *Caldwell*-type arguments on the reliability of jury determinations, as part of its work in developing and updating professional standards for prosecutors. One such set of standards was developed by a special committee of the ABA which drew on the experience of a large number of prosecutors, defense lawyers and judges. Since 1971, those ABA standards have provided that:

References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.

ABA Project on Standards for Criminal Justice: Standards Relating to the Prosecution Function and the Defense Function, 3-5.8, Commentary p.129 (App. Draft 1971). The ABA's expertise in this area, particularly as it relates to the distortion produced in the capital sentencing process, has been enhanced by its recent empirical examination of federal habeas review procedures.

Based on its long experience and its recent thorough study of habeas corpus, the ABA is convinced that if *Caldwell* is violated, the capital sentencing process is so fundamentally disrupted as to undermine confidence in the outcome and that therefore *Teague*'s second exception should apply to *Caldwell* claims. There is no rule which more legitimately belongs within *Teague*'s "fundamental fairness" exception than does the rule of *Caldwell*.

Caldwell error disrupts a capital jury's ability to give its "reasoned moral response" to the evidence. As this Court recognized in *Caldwell*, the capital jury's acceptance of responsibility for its life-or-death decision is integral to the legitimate exercise of its sentencing discretion. "This Court has always premised its capital punishment decisions on the assumption that the capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 472 U.S. at 341; cf. *Adams v. Texas*, 448 U.S. 38, 49-50 (1980).

If a prosecutor misleadingly tells a jury that it is not ultimately responsible for deciding whether death is the appropriate punishment in a particular case, the jury will be diverted away from making a "reasoned moral response" to the evidence and towards constitutionally impermissible considerations. Cf. *Beck v. Alabama*, 447 U.S. 625 (1980). Not only does *Caldwell* error undermine the reliability of the sentencing judgment in this way, it affirmatively invites the imposition of a death sentence without a finding that such a sentence is appropriate in the case at bar. As this Court explained in *Caldwell*,

If a jury understands that only a death sentence will be reviewed, it will also understand that any decision to "delegate" responsibility for sentencing can only be effectuated by returning that sentence.

Caldwell, 472 U.S. at 332. In addition:

Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely "err because the error may be corrected on appeal."

Id., at 331 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring in judgment)).

By inviting the jury to "send a message" and to impose what it is led to believe may only be a "symbolic" death sentence, prosecutorial argument that violates *Caldwell* also distracts the jury from assessing the concrete features of the case before it which may call for harshness or for leniency, and thereby jeopardizes the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner v. Shuman*, 483 U.S. 66, 75 (1987); see also *Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The correctness of the ABA's position that *Caldwell* error seriously undermines confidence in the jury's ability to make a responsible sentencing judgment is also shown by the consistent judicial condemnation of such error. In case after case since 1873, state courts have reversed as unreliable the death sentences or convictions of capital defendants whose juries were misled by *Caldwell*-type error. See, e.g., *State v. Robinson*, 421 So.2d 229, 233-34 (La. 1982) (prosecutor's remarks required reversal where the attention of the jury, which was misled about the power of appellate courts, was diverted away from the primary sentencing issue of the appropriateness of death); *Blackwell v. State*, 76 Fla. 142, 79 So. 731 (Fla. 1918) (prosecutor's remark that any error could be corrected by the Supreme Court required reversal because it "tended to lessen the weight of the jury's sense of responsibility" and caused jurors to shift responsibility "from their consciences to the Supreme Court"); *Commonwealth v. Smith*, 10 Phila. 189, 39 Phila. Leg. Int. 201 (Pa. 1873) (prosecutor's closing

argument which led the jury away from its own consideration of the defendant's case required reversal). ^{7/}

This impressive confluence of authority demonstrates a deeply rooted consensus that the prosecutorial misconduct condemned by this Court in *Caldwell* so seriously undermines confidence in a jury's sentencing determination as to constitute a violation of "fundamental fairness." Such misconduct plainly calls for application of the "fundamental fairness" exception to *Teague*.

^{7/} See also *Wiley v. State*, 449 So.2d 756, 762 (Miss. 1984); *Williams v. State*, 445 So.2d 798, 811-12 (Miss. 1984); *State v. Jones*, 251 S.E.2d 425, 427-29 (S.C. 1979); *Hawes v. State*, 240 S.E.2d 833, 839 (Ga. 1977); *Fleming v. State*, 240 S.E.2d 37, 40 (Ga. 1977); *State v. White*, 211 S.E.2d 445, 450 (N.C. 1975); *Prevatte v. State*, 214 S.E.2d 365, 367-68 (Ga. 1975); *People v. Morse*, 388 P.2d 33, 43-44 (Cal. 1964); *State v. Mount*, 152 A.2d 343, 352 (N.J. 1959); *Pait v. State*, 112 So.2d 380, 384 (Fla. 1959); *State v. Hawley*, 48 S.E.2d 35, 36 (N.C. 1948); *People v. Johnson*, 284 N.Y.182, 30 N.E.2d 465, 467 (N.Y. 1940).

CONCLUSION

For the above-stated reasons, the ABA urges that this Court hold that *Caldwell* is retroactively applicable under *Teague*'s second exception.

Dated: March 2, 1990

Respectfully submitted,

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No. 89-5809

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

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Petitioner,

—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE, AND BRIEF, OF STEPHEN H.
SACHS, KEVIN BOSHEA, JOHN CRAFT, RALPH
S. WHALEN, JR., KENNETH M. ROBINSON,
ROGER C. SPAEDER, AND NEVETT STEELE, JR.,
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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M. ROBINSON, ROGER C. SPAEDER,
and NEVETT STEELE, JR., FOR
LEAVE TO FILE BRIEF AMICI
CURIAE IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice
and Associate Justices, of the Supreme
Court of the United States:

Stephen H. Sachs, Kevin Boshea, John Craft, Ralph S. Whalen, Jr., Kenneth M. Robinson, Roger C. Spaeder, and Nevett Steele, Jr., by counsel, respectfully request leave to file the attached brief amici curiae.

The consent of the attorney for the petitioner has been obtained and filed with the Clerk. The attorney for the respondent has declined consent.

Amici are former prosecuting attorneys. Stephen H. Sachs is the former Attorney General for the State of Maryland, during which time he enforced the capital punishment statute of that state. He also formerly served as the United States Attorney for the District of Maryland. Kevin Boshea and John Craft formerly served as assistant district attorneys in the Orleans Parish District Attorney's Office, New Orleans, Louisiana.

Mr. Boshea prosecuted a number of death penalty cases, in two of which the death penalty was imposed. Mr. Craft was the Chief of Appeals for several years, representing the State's interests in appeals by death-sentenced individuals. Ralph v. Whalen, Jr. formerly served as a special prosecutor for Orleans Parish, New Orleans, Louisiana, during which time he prosecuted death penalty cases. Kenneth M. Robinson, Roger C. Spaeder, and Nevett Steele, Jr. formerly served as assistant United States attorneys, Mr. Robinson and Mr. Spaeder in the District of Columbia, and Mr. Steele in the District of Maryland.

Amici were and are committed to the ethical ideal of "honorable and professional performance of prosecutorial duties." I American Bar Association, Standards for Criminal Justice, The

Prosecution Function, Commentary to Standard 3-1.1 (2d ed. 1981). As persons who have borne the responsibilities of "administrator[s] of justice" (id., Standard 3-1.1(b)), amici view it as their obligation to provide their views to the Court concerning the egregious violations of law and ethical proscriptions by the prosecutor in this case. Moreover, as individuals who continue to be concerned with the fair and lawful administration of the criminal process, amici seek to ensure that this Court not erode the protections against abuses of the writ by allowing a litigant -- whether the prosecution or the defense -- to reap benefits from intentionally violating state law or procedural rules.

Accordingly, Mr. Sachs and his colleagues move for leave to file the attached brief as amici curiae.

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INTERESTS OF AMICI

The interests of Amici in filing this brief have been set forth in the preceding motion.

SUMMARY OF ARGUMENT

As this Court has stated, a prosecuting attorney "may prosecute with earnestness and vigor -- indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). As Amici will show, the prosecutor in this case struck blows that were undeniably "foul," violating both the American Bar Association's Standards Relating to the Prosecution Function and a state law rule that had been in existence for more than fifty years. As Part I of the brief will demonstrate, the prosecutor intentionally violated the applicable law and ethical rules. Part II

will show that the underlying rationale of the retroactivity doctrine of Teague v. Lane calls for refusing to reward a litigant who, like the prosecutor in this case, intentionally "flout[s] . . . state procedures for tactical or other reasons." Dugger v. Adams, 109 S. Ct. 1211, 1216 (1989).

ARGUMENT

I.

The Prosecutor Intentionally Violated State Law and Ethical Proscriptions

The prosecutor in this case made the following statements in closing argument to the jury:

The law provides that if you find one of these aggravating circumstances then what you are doing as a jury, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this

man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say that you are wrong so I ask that you do have the courage of your convictions

Appendix to Petition for A Writ of Certiorari, at A-45, A-47, A-48. In rebuttal argument, the prosecutor returned to this theme again, stating:

I ask that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend the death penalty.

Id. at A-52, A-53.

These arguments intentionally misstated the law concerning the effect of a jury's decision to impose a death sentence. The prosecutor informed the jury that its sentencing verdict would be "merely a recommendation" (id. at A-45) and "only the initial step . . . [of] saying . . . that this man['s] . . . actions could be prosecuted to the fullest extent of the law" (id. at A-47); but Louisiana law clearly provided that a jury's decision to recommend death was binding upon the trial court. La. Code Crim. Proc., art. 905.8.

Equally plainly, the prosecutor's

statements violated applicable legal canons governing prosecutorial closing arguments. As both the majority and dissent recognized in the en banc opinions below, "Louisiana . . . had, before Caldwell [v. Mississippi, 472 U.S. 320 (1985)] developed common law rules forbidding misleading jury argument about the importance of the jury's decision." Sawyer v. Butler, 881 F.2d 1273, 1290 (5th Cir. 1989). Accord, id. at 1299-1300 (King, J., dissenting) ("[a]t least five years before the Supreme Court decided Caldwell, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor in the jury's decision and invalidated the sentence").

The prosecutor surely was aware of his obligation not to divert the jury from

its duty to impose a punishment deemed appropriate on the basis of the circumstances of the offense and the character of the defendant, by interjecting irrelevant and inaccurate concerns about the consequences of imposing a particular sentence. The state law prohibitions against tactics of this sort had been in effect for more than a half-century. In State v. Johnson, 151 La. 625, 92 So. 139 (1922), the Louisiana Supreme Court reversed a death sentence because the prosecutor's closing argument injected irrelevant and misleading concerns about the likelihood of early parole in the event of a sentence of life imprisonment. The prosecutor in Johnson had argued:

"[T]he evidence in this case demands the death penalty, and while the law authorizes the jury to return a verdict of guilty as charged, without capital punishment, which would call for the sentence of life

imprisonment in the penitentiary, this law is a farce, or rather a fiction of the law. It does not mean what it says. It only means that the defendant would be sentenced to serve his natural lifetime in the penitentiary, and history shows that, after a short period of time, say 5, 10, or 15 years, he would be turned loose again on society."

Id. at 632, 92 So. at 142. The Louisiana Supreme Court held that this statement "transcended the bounds of legitimate and proper argument" (id. at 633, 92 So. at 142) and mandated the reversal of the death sentence (see id. at 635, 92 So. at 143). The court explained:

In all prosecutions for capital offenses in this state, the discretionary power is vested in the jury to qualify its verdict by finding the accused guilty without capital punishment, which means life imprisonment in the penitentiary at hard labor. In the exercise of this power the jury should be left free and untrammelled and should not be influenced by the personal opinion of the prosecuting officer as to the wisdom and expediency of the law, and the effect which, in his opinion, would result from a qualified verdict. . . . Simply because the law-making power of the state has

seen proper, in the exercise of its wisdom, to create a pardoning board, . . . and just because under that system, a life term is occasionally pardoned or paroled, furnishes no sufficient reason in law for an appeal to the jury to disregard the statute which vests in them the discretionary power to qualify the verdict, and to treat that law as a farce and utterly without any meaning whatever. . . .

The harmful effect of such an opinion of the law officer and of such an intemperate appeal to the jury must be apparent"

Id. at 633-34, 92 So. at 142.

In State v. Henry, 196 La. 217, 198 So. 910 (1940), the Louisiana Supreme Court similarly reversed a death sentence because the prosecutor argued to the jury that "politicians manipulating the [parole] boards often secured the parole and freedom of convicted murderers before they had served a sufficient part of their sentence." Id. at 261, 198 So. at 924.

In a number of other decisions which preceded the trial in this case, the

Louisiana Supreme Court enforced the state law rule that the prosecutor may not improperly influence the jury's decisionmaking by misstating the law or injecting extraneous influences. See, e.g., State v. McGhee, 350 So.2d 370, 375 (La. 1977) (prosecutor's statement in voir dire "that the presumption of theft is 'as strong as' the presumption that a defendant is presumed innocent . . . prejudiced defendants' constitutional rights to be presumed innocent and to be found guilty only if the state has proved them guilty beyond a reasonable doubt"); State v. Lee, 346 So.2d 682, 684 (La. 1977) ("[w]hen a jury is informed by the state that the accused was convicted of the crime on a previous occasion, the defendant's right to a fair trial, protected by both the federal and state constitutions, has been violated").

At the time of the trial in this case, there was also caselaw in numerous other jurisdictions which expressly prohibited prosecutors from misleading a jury into believing that its verdict would be merely advisory or that any errors in the verdict could be fully corrected on appeal. See, e.g., Beard v. State, 19 Ala. App. 102, 95 So. 333, 334-35 (1923); People v. Morse, 60 Cal.2d 631, 653, 388 P.2d 33, 47, 36 Cal. Rptr. 201, 215 (1964); Pait v. State, 112 So.2d 380, 384 (Fla. 1959); Hawes v. State, 240 Ga. 327, 335, 240 S.E.2d 833, 839 (1977); Shoemaker v. State, 228 Md. 462, 473-74, 180 A.2d 682, 688 (1961); People v. Johnson, 284 N.Y. 182, 187, 30 N.E.2d 465, 467 (1940); State v. Jones, 296 N.C. 495, 501, 251 S.E.2d 425, 429 (1979); State v. Gilbert, 273 S.C. 690, 698, 258 S.E.2d 890, 894 (1979). One such out-of-state case,

Prevatte v. State, 214 S.E.2d 365 (Ga. 1975), was cited in a Louisiana Supreme Court decision shortly before petitioner's trial, and described as a case in which a death sentence was reversed because "an unobjected to argument by a district attorney may have influenced the jury to impose a more severe sentence than unbiased judgment would have given." State v. Sonnier, 379 So.2d 1336, 1371 n.4 (La. 1979).

The ethical standards in effect at the time of petitioner's trial also explicitly prohibited prosecutorial arguments such as those made in this case. The ABA Standards Relating to the Prosecution Function stated:

The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function Standard 5.8(d) (Approved Draft 1971).

The Commentary to the Rule explained:

References to the likelihood of other authorities, such as the governor or the appellate courts, correcting an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.

Id., Commentary to Standard 5.8(d). In a related vein, the National Prosecution Standards promulgated in 1977 by the National District Attorneys Association reflected a keen awareness of the power of closing argument and the care with which such arguments had to be made in order to honor the prosecutor's dual responsibilities:

The prosecutor's dual responsibility to seek justice and to vigorously present the government's case must at no other time be so delicately

balanced as at closing argument.

Id. at 280. In keeping with this, Standard 17.17 (a) directed that "closing argument to the jury . . . be characterized by fairness [and] accuracy...." Id.

It can hardly be suggested that the prosecutor in this case was somehow unaware of these legal and ethical requirements. The ethical requirement is of the sort that every prosecutor is obliged to know. The text of the ethical rule had even been quoted in decisions of the Louisiana Supreme Court. See, e.g., State v. Kaufman, 304 So.2d 300, 308 (La. 1974) (quoting Standard 5.8(c) and referring to the ABA Standards Relating to the Prosecution Function as "authoritative"); State v. Governor, 331 So.2d 443, 454 (La. 1976) (Dixon, J., dissenting). It is also inconceivable

that the prosecutor was ignorant of the legal impropriety of such arguments, in light of the Louisiana Supreme Court decisions dating back to 1922 and the proliferation of contemporary caselaw in other jurisdictions outlawing the very practice the prosecutor elected to use in this case. Prosecutors' training materials available at the time specifically advised against such arguments, citing to caselaw of this sort. See, e.g., National District Attorneys Association, The Prosecutor's Deskbook 482 (P. Healy & J. Manak eds. 1971) ("If setting the punishment is a function of the jury and it is a one-stage trial, then it must be remembered that generally the prosecutor cannot comment on the possible action of the pardon and parole board."); Practicing Law Institute, II Manual for Prosecuting Attorneys 661 (M. Ploscowe ed.

1956) ("Not infrequently the prosecuting attorney will refer to the right of the accused to appeal, or his right to apply for parole after he has been committed, or that when these rights of the accused are exhausted, he may still apply for executive clemency. Where the purpose of these remarks is to convey the impression to the jury that the consequences of their verdict are of little importance since their errors will be corrected on appeal, the verdict may well be reversed.").

Nor can it be said that the prosecutor's violations of legal and ethical norms in this case were merely inadvertent. This was not an isolated slip in an otherwise proper argument. Rather, the prosecutor deliberately developed a theme and pressed it repeatedly throughout his initial and rebuttal arguments. His words were

carefully crafted, and the entire argument bears the earmark of calculated double-talk -- for example, the strained logic by which references to appellate courts were made ostensibly relevant in several unrelated ways -- practiced by a lawyer who well knows that what he is doing is wrong and seeks to camouflage it. Again and again, he hammered home the message that the jury need feel no responsibility for a verdict of death because any possible errors would be corrected by the trial court or the appellate courts.

As the Standards Relating to the Prosecution Function recognize, there is a great likelihood that a "jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with his office, but also because of the fact-finding

facilities presumably available to him." Commentary to Standard 5.8. In this case, the prosecutor systematically exploited the "special weight" (ibid.) of his position to manipulate the jury in the very way prohibited by state law and ethical requirements.

II.

The Retroactivity Doctrine Established in Teague v. Lane and Penry v. Lynaugh Does Not Apply to This Case Because the Prosecutor Acted in Bad Faith and in Violation of Existing Legal Rules

As a plurality of this Court explained in Teague v. Lane, 109 S. Ct. 1060 (1989), the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 1074. The retroactivity doctrine

enunciated in Teague and adopted by a majority of the Court in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), is primarily designed to assure that criminal proceedings which are properly conducted under the constitutional law in effect at the time of the proceedings are not upset simply because of subsequent changes in the law.

In its emphasis upon the interests of finality, the Teague/Penry doctrine continues the traditional retroactivity rule's approach of protecting the "justifiabl[e] . . . reli[ance]" of "prosecutors, trial judges, and appellate courts . . . on the [currently operative legal] standard[s]." Allen v. Hardy, 478 U.S. 255, 260 (1986); see also Linkletter v. Walker, 381 U.S. 618, 636 (1965). As the Teague plurality explained, one of the costs of retroactive application of

constitutional rules is the "'understandabl[e] . . . frustrat[ion]" of those "state courts . . . [which] faithfully appl[ied] . . . existing constitutional law.'" 109 S. Ct. at 1075 (quoting Engle v. Isaac, 456 U.S. 107, 128 n. 33 (1982)). See also Teague, supra at 1074, quoting Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940) ("'[q]uestions of . . . prior determinations deemed to have finality and acted upon accordingly . . . demand examination'") (emphasis added). The Teague/Penry rule protects the interests of finality and justifiable reliance by limiting the application of new constitutional rules which the "state courts cannot 'anticipate, and so comply with.'" Teague, supra at 1075 (quoting Brown v. Allen, 344 U.S. 443, 534 (1953) (concurring opinion of Justice Jackson)).

As Justice Harlan explained in his exposition of the retroactivity approach adopted by the Teague plurality, this approach achieves a proper balance between "various competing alternatives, including . . . the extent to which justifiable expectations have grown up surrounding one rule or another." Mackey v. United States, 401 U.S. 667, 677 (1971) (separate opinion of Justice Harlan).

The type of "justifiable reliance" protected by both the Teague/Penry and Linkletter standards is, of course, "'good-faith reliance.'" Hankerson v. North Carolina, 432 U.S. 233, 241 (1977); Jenkins v. Delaware, 395 U.S. 213, 219 (1969). A prosecutor who willfully violates the applicable law -- whether that be the commands of the federal constitution, state law, or professional ethics -- should not be permitted to claim

the benefits of the Teague/Penry doctrine. Such conduct cannot be considered "justifiable" reliance within the meaning or spirit of any cognizable non-retroactivity rule. Moreover, as this Court has long recognized, litigants are equitably estopped from reaping benefits by intentional, bad faith violations of constitutional or state law. Cf. Dugger v. Adams, 109 S. Ct. 1211, 1216-17 (1989) (declining to "exercise our equitable power to overlook [the defendant's] . . . state procedural default," in part because "there was . . . reason for suspecting that defense counsel was flouting state procedures for tactical or other reasons"); Amadeo v. Zant, 108 S. Ct. 1771, 1776-77 (1988) (the "cause" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977), will not be applied in favor of the prosecution in cases in which

the prosecutor interfered with the defendant's compliance with the defaulted procedural rule); Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (double jeopardy doctrine permitting a retrial following a mistrial requested by the defendant will not be applied in favor of the prosecution if the prosecutor engaged in conduct "intended to 'goad' the defendant into moving for a mistrial").

The prosecutor in this case repeatedly and willfully "flout[ed] . . . state [law] [and ethical rules]. . . for tactical . . . reasons." Dugger v. Adams, supra, 109 S. Ct. at 1216. To reward this conduct by denying relief to the petitioner would be in direct contravention of the rationale and purposes of this Court's retroactivity doctrine.

CONCLUSION

As the ABA Standards Relating to the Prosecution Function emphasize, "[t]he duty of the prosecutor is to seek justice, not merely to convict." Standard 1.1(c). The prosecutor in this case sacrificed state law, professional ethics, and justice, solely for the sake of procuring a sentence of death. His actions were the very antithesis of "justifiable reliance" on existing law. Thus, whatever the effect of the "new rule" and "old rule" doctrines in other cases, the Teague/Penry rule should not be applied to bar the retroactive application of Caldwell v. Mississippi to this case.

Dated: March 2, 1990

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

—v.—

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*,
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., IN SUPPORT OF PETITIONER**

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No. 89-5809

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMICUS CURIAE, NAACP
LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE¹

The NAACP Legal Defense and
Educational Fund, Inc., is a non-profit

¹ Letters from the parties
consenting to the filing of this Brief
have been lodged with the Clerk of the Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf.

Because race has been a consistent concern in the administration of capital sentencing statutes, the Fund has for many years been involved in the defense of persons charged with or convicted of capital crimes. Increasingly, death penalty litigation has required the Court to examine the operation of the federal habeas corpus process. Recently, for example, two of the Fund's clients have been before the Court in cases focusing on

nettlesome questions concerning habeas corpus procedures.²

The questions presented by Mr. Sawyer's case are such questions. In light of our experience in capital habeas litigation, we believe that our views on these questions can be of material aid to the Court in the disposition of Mr. Sawyer's case

SUMMARY OF ARGUMENT

In Mr. Sawyer's case, the Fifth Circuit's analysis of what constitutes a new constitutional rule of criminal procedure under Teague v. Lane, 103 L.Ed.2d 334 (1989) is in deep conflict with Teague's analysis. Teague adopted Justice Harlan's jurisprudence of retroactivity, which requires retroactive

² See Selva v. Collins, ___ U.S. ___, 58 U.S.L.W. 4221 (February 21, 1990); Zant v. Moore, ___ U.S. ___, 103 L.Ed.2d 922 (1989).

application of a new rule in cases that became final before the new rule was announced if, applying the constitutional standards that were in place at the time a habeas petitioner's conviction became final, "one could never say with any assurance that this Court would have ruled differently at [that time]." Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting). The Fifth Circuit's analytical framework, which was articulated and applied to bar the application of Caldwell v. Mississippi, 472 U.S. 320 (1985) in Mr. Sawyer's case, is radically different. It looks only at whether the rule announced in the subsequent case was different in any respect from the rule applied, or that probably would have been applied, at the time the case became final. If there is any material difference, retroactive

application of the new rule is barred. No inquiry is made -- as it is in Justice Harlan's analysis -- to determine whether the "new" rule would have been adopted by this Court at the time the petitioner's conviction became final had a case simply been before the Court which called for such a rule.

If Teague is to be viable, the Fifth Circuit's non-retroactivity ruling in Mr. Sawyer's case must be reversed. Utilizing the Teague-Harlan framework of analysis, one cannot "say with any assurance that this Court would have ruled differently [on the Caldwell issue] at the time [Mr. Sawyer's] conviction became final." Desist, 394 U.S. at 263-64. All of the constitutional standards utilized to decide Caldwell were equally available fourteen months before Caldwell was decided, the time at which Sawyer's

conviction became final. No new principle relevant to the Caldwell analysis emerged during that fourteen-month interval. Under Teague's analytical requirements, Caldwell is retroactively applicable in Mr. Sawyer's case.

In addition, the Fifth Circuit's framework for analyzing retroactivity will destroy the values subordinated to the interest in finality, yet still safeguarded, in Teague. First, persons similarly situated in relation to the evolution of constitutional principles, yet differently situated on the continuum of time, will be treated differently--solely because of the fortuity of the moment at which this Court decides to review a particular issue. There could be no more arbitrary or capricious basis upon which to classify persons' entitlement to the benefit of law. Second, at trial and

on appeal, prosecutors and state court judges will be encouraged to distinguish and not apply existing constitutional standards, for any colorable distinction will allow them to insulate convictions from federal habeas review in light of decisions announced by this Court after the convictions become final. The goal of federalism -- a joint state-federal partnership to "guard and protect rights secured by the Constitution," Ex parte Royall, 117 U.S. 241, 251 (1886) -- will be defeated in the process. Finally, federal habeas courts will not be allowed to determine whether the principles of constitutional law that were established at the time a petitioner's case became final could logically have been extended then to support a decision similar to one the Court announced thereafter. As a result, the lower federal courts will no

longer be able to play a role in the evolution of constitutionally based rules of criminal procedure. If these destructive consequences are deemed compatible with Teague, the wisdom of Teague will be drawn profoundly into question.

ARGUMENT

For purposes of Teague v. Lane, 103 L.Ed.2d 334 (1989), Robert Sawyer's case became final on April 2, 1984. Fourteen months later, the Court decided Caldwell v. Mississippi, 472 U.S. 320 (1985). The threshold question presented by Mr. Sawyer's challenge to his death sentence under Caldwell is whether the Caldwell decision enunciated "new law" that is nonretroactive within Teague.

A majority of the Fifth Circuit below held that Caldwell established new law. However, the analysis that led it to this

conclusion is at war with the doctrinal basis for the Court's decision in Teague. Further, it is so destructive of the values subordinated but nonetheless safeguarded by the Court in Teague that it calls into grave question the wisdom of Teague itself.

Respect for the doctrinal underpinnings of Teague and for the balance that it struck among the competing values surrounding retroactivity principles demands that the Fifth Circuit's ruling be set aside. If analyzed in keeping with the views of Justice Harlan, which the Court adopted in Teague, the rule of Caldwell is a classic example of the kind of rule which Justice Harlan would have applied retroactively: one that is "grounded upon fundamental principles whose content does not change dramatically from year to year, but whose

meanings are altered slowly and subtly as generation succeeds generation" -- a rule which is not new because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting).

A. The Fifth Circuit's Analytical Framework

The Fifth Circuit majority held that Caldwell established a new rule of constitutional law that could not be applied retroactively to Mr. Sawyer's case. Sawyer v. Butler, 881 F.2d 1273, 1290-91 (5th Cir. 1989) (en banc). The majority reached this result by comparing the substance of the rule announced in Caldwell with the rule of Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

It recognized that an Eighth

Amendment violation occurs under Caldwell when "the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." 881 F.2d at 1286. Noting that this error could also have been attacked as a due process violation under Donnelly, the majority found that the primary difference between Caldwell and Donnelly was in the measure of prejudice required to establish a constitutional violation. Under Donnelly, a petitioner had to show that the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process," 416 U.S. at 643; under Caldwell, the petitioner had to show only that the argument could have had some effect on the

sentencing decision, 472 U.S. at 341.³ The Fifth Circuit found that this aspect of Caldwell was new, because it "'was not dictated by precedent existing at the time the defendant's conviction became final,'" Sawyer v. Butler, 881 F.2d at 1291 (quoting Teague v. Lane, 103 L.Ed.2d at 349 (emphasis in original)) -- i.e., it was not dictated by Donnelly. Accordingly, the Fifth Circuit concluded that "Caldwell's greatly heightened intolerance of misleading jury argument is a new rule within the meaning of Teague." 881 F.2d at 1291.

B. The Doctrinal Underpinnings of Teague: Whether A Subsequently - Announced Rule Is New Must Be Determined By Whether This Court

³ The Caldwell Court phrased the test of prejudice in the negative: "Because we cannot say that [the prosecutor's argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341.

Would Have Ruled Differently At The Time The Petitioner's Conviction Became Final

The analytical process which led the Fifth Circuit to its conclusion in Sawyer was simple and straightforward. The court first identified the most nearly controlling single precedent which Sawyer could have cited at the time his case became final. That, it believed, was Donnelly. It then color-matched Donnelly and Caldwell to determine whether Caldwell held anything that, in comparison to Donnelly, was different or more advantageous to Mr. Sawyer. Finding that the measure of prejudice was such an element, the court declared that Caldwell established a new rule and thus could not be applied retroactively.

In sharp contrast to the Fifth Circuit's analytical framework, the framework espoused by Justice Harlan for

determining whether a rule announced by this Court after a case becomes final is "new" focuses on "the constitutional standards dominant at the time of [a petitioner's] conviction," and whether "the proper implications of th[ose] governing precedents" would have led the Court to announce the rule subsequently announced if it had decided the question before the petitioner's case became final. Desist v. United States, 394 U.S. at 268 (Harlan, J., dissenting). If in light of these "governing precedents," "one could never say with any assurance that this Court would have ruled differently at the time petitioner's conviction became final," the subsequently announced rule is not "new" and should be applied retroactively. Id. at 264.

Unlike the Fifth Circuit's approach to newness, Justice Harlan's approach

attempts to measure what all the relevant constitutional standards were at the time a petitioner's case became final, and to decide whether those standards would have supported the same rule that was later articulated in the supervening decision. The Fifth Circuit's approach measures only whether there is a difference between the rules articulated in cases before and after the petitioner's case became final. It does not examine whether any difference is the result of newly-evolved constitutional principles or simply fortuity. This kind of examination--which goes to the heart of Justice Harlan's perspective -- can be conducted only by asking how the supervening case would have been decided at the time the petitioner's conviction became final.

Accordingly, Justice Harlan's approach, not the Fifth Circuit's

approach, is the one in keeping with the purpose of the retroactivity doctrine: "in adjudicating habeas petitions, ... to apply the law prevailing at the time a conviction became final," Teague, 103 L.Ed.2d at 353 (citation omitted). Anticipating the very approach to "new" law analysis that the Fifth Circuit adopted in Sawyer, Justice Harlan cautioned that the attractive simplicity of this approach should not be allowed to conceal its underlying inequity:

It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at the time of a petitioner's conviction. One may well argue that it is of paramount importance to make the "choice of law" problem on habeas as simple as possible, applying each "new" rule only to those cases pending at the time it is announced. While this would obviously be

simpler, simplicity would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

Desist v. United States, 394 U.S. at 268.

In "adopt[ing] Justice Harlan's view of retroactivity for cases on collateral review," Teague v. Lane, 103 L.Ed.2d at 356, the Court plainly embraced these principles. The Teague plurality repeatedly referred to Justice Harlan's view that "'the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place,'" Teague, 103 L.Ed.2d at 353 (quoting Desist v. United States, 394 U.S. at 262-63 (Harlan, J., dissenting)), and that "'it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final...[,]" id.

(quoting Mackey v. United States, 401 U.S. 667, 689 (1971) (separate opinion of Harlan, J.)). Neither the Court nor Justice Harlan narrowed the retroactivity inquiry to a mere search for differences between decisions before and after the petitioner's case became final. Indeed, the Court's proponents of Justice Harlan's views have confirmed that the appropriate inquiry concerning the retroactivity of a decision announced after a petitioner's case has become final is: "how the Court would have decided this case at the time petitioner was convicted." Truesdale v. Aiken, 480 U.S. 527, 529 (1987) (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

C. The Fifth Circuit's Decision In Mr. Sawyer's Case Must Be Reversed If The Doctrinal Basis Of Teague Is To Be Preserved

As we have noted, in deciding Mr.

Sawyer's case the Fifth Circuit asked only whether, at the time Sawyer's case was tried or appealed, the specific prior holdings of this Court -- not the established, generalized principles of constitutional law -- would have provided the remedy to which he was entitled under Caldwell v. Mississippi. Finding that no existing decision would have provided the remedy he could obtain under Caldwell, the Fifth Circuit held that Caldwell announced a nonretroactive new rule. If the Fifth Circuit had instead asked the question Justice Harlan would have asked -- whether "one could ... say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final," Desist, 394 U.S. at 264 -- its conclusion concerning the retroactive application of Caldwell in Mr. Sawyer's case would have been

precisely the opposite.

To determine whether the Court would have ruled differently if it had been presented with the Caldwell question at the time Mr. Sawyer's conviction became final, one must examine the rationale for the Court's decision in Caldwell and whether that rationale would have been the same if the Caldwell question had been decided before April 2, 1984, the date on which Mr. Sawyer's conviction and sentence became final.

The rationale for the holding in Caldwell had five components. First, the Court reasoned that jurors who felt the full weight of responsibility for sentencing someone to death would act with utmost care in making a sentencing decision. 472 U.S. at 329-30. Second, the Court found that the exercise of sentencing discretion in this manner was

necessary to meet "the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" 472 U.S. at 330 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). Third, the Court determined that the right to have all relevant mitigating factors considered could only be effectuated by the sentencer. If the sentencer felt less responsibility than it should for the sentencing decision, full consideration might not be given to mitigating circumstances. Caldwell, 472 U.S. at 330-31. Fourth, the Court found that the jury's mistakenly diminished sense of responsibility for the sentencing decision might lead it to impose a death sentence without determining that death was the appropriate sentence -- in order to "send a message" of extreme disapproval for the

defendant's acts" to the appellate court, 472 U.S. at 331, or to transfer the ultimate burden of the sentencing decision to the appellate court, 472 U.S. at 332-33, in the mistaken belief that the appellate court was at liberty to impose the most appropriate sentence. Id. In these circumstances, a death sentence could be imposed even though no one had made an individualized determination that the defendant's moral culpability was great enough to warrant death. 472 U.S. at 331-32, 333. Fifth, the Court found that misleading argument concerning the scope of appellate review of the sentencing decision created the risk that the jury would impose death "based on a wholly irrelevant factor": the "desire to avoid responsibility for its sentencing decision," which could be avoided only by imposing a reviewable sentence -- death.

472 U.S. at 332.

Each of these components was well-rooted in Eighth Amendment principles established before Mr. Sawyer was tried in September, 1980. Many were even more firmly established by the time his conviction and sentence became final on April 2, 1984. The assumption that jurors who felt the full weight of responsibility for sentencing someone to death would act with the greatest of care in exercising sentencing discretion had been accepted by the Court since at least 1971, when it was articulated in McGautha v. California, 402 U.S. 183, 208 (1971). In the Court's post-Furman Eighth Amendment jurisprudence, the need for jurors to exercise their capital sentencing discretion out of a full sense of the "awesome responsibility" they bore was "taken as a given." Caldwell v.

Mississippi, 472 U.S. at 329. The heightened need for reliability in the decision to impose a death sentence was universally accepted as an Eighth Amendment requirement during the entire time Mr. Sawyer's case was "non-final." See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982). Similarly, the right to have all relevant mitigating circumstances considered and given full effect by the sentencer was well settled before Mr. Sawyer's Teague date, Lockett v. Ohio, 438 U.S. at 604-06; Eddings v. Oklahoma, 455 U.S. at 110-17; see Penry v. Lynaugh, 106 L.Ed.2d 256, 276-78 (1989) (confirming the settled character of this right during the early 1980's), as was the right to an

individualized determination of the appropriateness of the death sentence, Woodson v. North Carolina, 428 U.S. at 303-304; Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37 (1977); Lockett v. Ohio, 438 U.S. at 601-605; Eddings v. Oklahoma, 455 U.S. at 110-12; Zant v. Stephens, 462 U.S. 862, 879 (1983), and the right to a sentencing process which minimized the risk that arbitrary or irrelevant factors could influence the outcome, Gregg v. Georgia, 428 U.S. at 189 (characterizing the consensus expressed by the Court in Furman v. Georgia, 408 U.S. 238 (1972)); id. at 206-207; Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980); Zant v. Stephens, 462 U.S. at 874-78.

Accordingly, all of the

constitutional principles which informed the Court's decision in Caldwell were established before Mr. Sawyer's case became final. During the fourteen-month interval between his case becoming final and the decision in Caldwell, no new principle of law emerged which had any bearing on the decision in Caldwell. There is no historical or analytical reason to suggest that the Court would have ruled differently on the Caldwell question if it had reached that question before Mr. Sawyer's conviction became final.⁴

⁴ The only principle which might conceivably have pointed to a different outcome on the Caldwell question was also available before Mr. Sawyer's case became final. In California v. Ramos, 463 U.S. 992 (1983), the Court held that the Constitution did not prohibit the states from giving a capital sentencing jury accurate information about post-sentencing procedures. To this extent, prosecutorial argument about appellate review -- even if it had the consequence of diminishing the jury's sense of

Within the framework adopted in Teague for determining whether a decision handed down after a habeas petitioner's case has become final announces a "new constitutional rule[]" of criminal procedure," Teague, 103 L.Ed.2d. at 356, Caldwell did not announce such a rule.

D. The Fifth Circuit's Decision Must Also Be Reversed Because It Is So Destructive Of The Values Subordinated By Teague That It Calls Into Question The Continuing Viability of Teague

In Teague, as well as in Justice

responsibility for the sentencing decision -- seemed to be sanctioned by Ramos. However, as both the plurality and concurring opinions made clear in Caldwell, Ramos did not imply that "States are free to expose capital sentencing juries to any information and argument regarding post sentencing procedures," no matter how inaccurate. 472 U.S. at 335 (plurality opinion). Accord id. at 342 (opinion of O'Connor, J., concurring). "Certainly, a misleading picture of the jury's role is not sanctioned by Ramos." Id. Thus, there was no settled constitutional principle at the time Mr. Sawyer's case became final that pointed to any outcome on the Caldwell question other than the outcome later reached in Caldwell.

Harlan's retroactivity jurisprudence, the criminal justice system's interest in finality is given paramount importance. See Teague v. Lane, 103 L.Ed.2d at 352-56; Mackey v. United States, 401 U.S. at 682-83 (separate opinion of Harlan, J.) Nevertheless, the values which are subordinated to the interest in finality are values about which the Court and Justice Harlan are also genuinely concerned. These include (1) the need for fairness and even-handedness in the adjudication of the claims of persons similarly situated, see Teague, 103 L.Ed. at 349-52; Mackey v. United States, 401 U.S. at 689; (2) the need to encourage prosecutors and state court judges to adhere in good faith to governing constitutional principles by "chart[ing] out [and honoring] the proper implications of the governing precedents," Desist v.

United States, 394 U.S. at 268 (Harlan, J., dissenting), rather than to give the narrowest possible reading to established constitutional principles, see Teague, 103 L.Ed.2d at 353; Desist v. United States, 394 U.S. at 262-63; and (3) the need to encourage the lower courts to continue to play an active and significant role in "developing or interpreting the Constitution." Mackey v. United States, 401 U.S. at 680. If affirmed, the Fifth Circuit's view of retroactivity will completely undermine these important values.

The interest in fair and even-handed adjudication of the claims of persons similarly situated is decimated by the Fifth Circuit's ruling, which provides no principled reason for the distinction that it draws between Robert Sawyer's case and Bobby Caldwell's case. In the

retroactivity jurisprudence of Justice Harlan, the only reason why it is fair to distinguish between habeas petitioners, whose cases have become final, and persons in trial or on direct appeal, whose cases have not become final, is that the constitutional principles that were established at the time of the habeas petitioner's trial or direct appeal would not then have supported the decision announcing the new rule. The evolution of legal principles that was needed to support the subsequent new rule decision distinguishes these two persons. While other definitions of fairness might call for the retroactive application of every new rule, see Mackey v. United States, 401 U.S. at 689, the Harlan jurisprudence does not do so. Instead, it makes a principled accommodation -- based on the evolution of law -- between the interests of finality

and fairness.

In contrast, the Fifth Circuit's jurisprudence makes no attempt to accommodate finality and fairness. It distinguishes habeas petitioners from persons whose cases are not final solely on the basis of irrelevant fortuities of timing -- the sheer accident of when this Court happens to review and decide a particular question. It makes no effort to root the significance of this difference of timing in the evolution of law and to treat persons similarly situated in relation to the determinative constitutional principles -- though differently situated in time -- similarly, as the Harlan approach does. Instead, it differentiates persons on the basis of flukes of timing that have absolutely no substantive significance. Nothing, we submit, could be more destructive of the

values of fairness and even-handedness which the Court sought to safeguard in Teague.

The second interest that is gravely jeopardized by the Fifth Circuit's distortion of Teague is the need to encourage prosecutors and lower courts to comply with established constitutional principles. As Justice Harlan recognized, "[T]he threat of habeas serves as a necessary incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." Desist v. United States, 394 U.S. at 262-63 (quoted with approval in Teague v. Lane, 103 L.Ed.2d at 353). The Fifth Circuit's decision in Sawyer substantially diminishes this incentive, for it encourages prosecutors and state judges to give the narrowest, most cramped

reading possible to established constitutional principles.

The reason for this is that the Fifth Circuit's decision puts an enormous premium on prosecutors' and state courts' efforts to limit the reach of established constitutional principles. Under the Fifth Circuit's jurisprudence, if prosecutors or state courts can distinguish existing constitutional precedents from their own cases by giving the narrowest possible reading to the principles underlying the precedential decisions, a habeas court will subsequently decide that existing precedent did not control, and that any subsequent controlling decision cannot be applied retroactively. Through this mechanism, the states can effectively insulate much of their criminal process from federal review.

Accordingly, instead of encouraging the states to honor their duty to "guard and protect rights secured by the Constitution," Ex parte Royall, 117 U.S. 241, 251 (1886) -- one of the purposes of retroactivity doctrine -- the Fifth Circuit's approach will actually discourage the states from seeking to protect constitutional rights. The very premise of federalism, that when "a State's judicial system...[is]...fairly accorded the opportunity to resolve federal issues arising in its courts," Huffman v. Pursue Ltd., 420 U.S. 592, 609 (1975), "state courts may become increasingly familiar with and hospitable toward federal constitutional issues," Rose v. Lundy, 455 U.S. 509, 519 (1982), will be eroded.

Finally, the Fifth Circuit's decision will effectively end any role of the lower

federal courts in the evolution of constitutional rules of criminal procedure. Under Sawyer, the only role for the lower courts in federal habeas proceedings will be to determine whether any of this Court's decisions that were announced before the petitioner's case became final squarely control any of the issues in his case. The federal habeas courts will not be allowed to determine whether principles of constitutional law that were established when a petitioner's case became final could logically have been extended at that time to support a decision in his case akin to one this Court announced thereafter (after the petitioner's case became final). Instead, federal habeas judges will be forced to assume the role condemned by Justice Harlan: they will be "reduced largely to the role of automatons, directed by us to

apply mechanistically all then-settled federal constitutional concepts to every case before them." Mackey v. United States, 401 U.S. at 413.

In essence, therefore, the Fifth Circuit's rule is a rule that will substantially interfere with the very function of judging. Lower court judges will not be allowed to ask whether the logic of existing constitutional principles extends to factual circumstances in which the principles have not previously been applied. At its core, this is what judging -- indeed, this is what our system of legal rules -- is all about. Justice Harlan was not simply describing the circumstances in which there should be retroactive application of supervening decisions when he wrote:

One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's

constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.

Desist v. United States, 394 U.S. at 263. He was also describing the process of law, which is inherently evolutionary. It is a process from which Sawyer, if affirmed, would exclude federal habeas judges.

Conclusion

At bottom, the doctrine of retroactivity is a doctrine which seeks to classify cases in relation to the passage of time and the evolution of law. If at all relevant times in the progress of a case -- when closing arguments are made, when the direct appeal is pending, and, after the case has become final, when federal habeas proceedings are ongoing-- the conceptual structure of the law is

the same, a habeas petitioner is entitled to the application of a supervening decision by this Court which is supported by that conceptual structure. To deny the petitioner the benefit of such a supervening decision simply because it adds a new element to the rule of law is to turn the doctrine of retroactivity from a necessarily categorical but not irrational tool of classification into an unnecessarily arbitrary and irrational one. That is precisely what the Fifth Circuit accomplished in Mr. Sawyer's case.

For these reasons, the NAACP Legal Defense and Educational Fund, as amicus curiae, requests that the Court reverse the decision of the Fifth Circuit in Mr. Sawyer's case.

Respectfully submitted,

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No. 89-5809

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

vs.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary.

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Is *Caldwell v. Mississippi* a “new rule” within the meaning of *Teague v. Lane*?
2. Is the rule petitioner seeks in the present case new beyond *Caldwell*?
3. Does either rule qualify for the second exception to nonretroactivity under *Teague*?

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IN THE
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OCTOBER TERM, 1989

ROBERT SAWYER,
Petitioner,

vs.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. CJLF has received written consent of the parties to file this brief.

The present case involves a collateral attack on a final judgment based on a claim which defendant did not mention at trial and which is not a bedrock rule of fairness. Such unnecessary attack on the finality of criminal judgments is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 28, 1979, petitioner Robert Sawyer and an accomplice murdered Fran Arwood in an attack of unspeakable savagery committed for no apparent reason. The murderers beat Ms. Arwood, scalded her with boiling water, and burned her with lighter fluid. Defendant stated to his accomplice that this last act was for the purpose of showing "just how cruel he could be." *State v. Sawyer*, 422 So. 2d 95, 97-98 (La. 1982). Sawyer had previously been indicted for murder of a four-year-old child and had pleaded guilty to manslaughter on that charge. *Id.*, at 100.

Sawyer was sentenced to death. His sentence became final in 1984, *Sawyer v. Louisiana*, 466 U. S. 931, before this Court's decision in *Caldwell v. Mississippi*, 472 U. S. 320 (1985). He later contended that the prosecutor's closing argument was improper. That contention was rejected by the state post-conviction review judge, the state supreme court, the federal district court, and a panel of the federal court of appeals. The *en banc* court of appeals held that the *Caldwell* issue could not be considered because it was a "new rule" under *Teague v. Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

SUMMARY OF ARGUMENT

Teague v. Lane, *supra*, establishes a separation of fundamental from nonfundamental constitutional claims. Fundamental claims continue to receive full *de novo* review on habeas corpus, while nonfundamental claims are reviewed only for disobedience of controlling precedent. This separation is good law and good policy.

Caldwell v. Mississippi, *supra*, is a new rule, and the rule petitioner seeks to make in this case is new beyond *Caldwell*. Reasonable judges could differ and have differed in good faith on both points.

Caldwell is not a "bedrock procedural element" qualifying for the second *Teague* exception, because a *Caldwell* violation does not raise a grave danger of a return to the arbitrary sentencing which existed prior to *Furman v. Georgia*, 408 U. S. 238 (1972).

ARGUMENT

I. *Teague* establishes a graduated scale of habeas review.

In *Teague v. Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), this Court accepted, with some modifications, the approach to retroactivity on habeas corpus proposed by Justice Harlan in *Desist v. United States*, 394 U. S. 244, 256-257 (1969) (dissent) and *Mackey v. United States*, 401 U. S. 667, 691-693 (1971) (concurring in the judgment).² Although the question arises in the course of deciding on retroactivity, the problem dealt with in *Teague* "must be considered as none other than a problem as to the scope of the habeas writ." *Mackey*, 401 U. S., at 684.

The net result of *Teague* is a recognition that "claims of constitutional error are not fungible" for the purpose of determining the degree to which they will be considered on habeas corpus. See *Rose v. Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting). In combination with earlier precedents, *Teague* establishes a graduated scale of review. Certain claims of fundamental error will receive full *de novo* review; some lesser claims will be reviewed only for state court disobe-

2. There seems to be some uncertainty as to how to designate this opinion. We call it "concurring in the judgment" because that is what it is in the *Mackey* case where it appears. The same opinion is also a dissent in *Williams v. United States*, 401 U.S. 646, 665 (1971).

dience of controlling precedent; some claims will not be reviewed on habeas at all.

A. The Perennial Questions.

Two questions continually recur in the habeas corpus area: what questions can be considered and what deference is due the trial and appellate courts' resolutions of those questions. For collateral attacks on felony convictions, the common law could not be more clear. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830); see also *Bushell's Case*, 124 Eng. Rep. 1006, 1009-1010 (C. P. 1670); 3 W. Blackstone, *Commentaries* 131 (1768).

The *Watkins* rule that habeas would lie for collateral attack only if the entire criminal proceeding was a nullity was still in force as late as *Ex parte Royall*, 117 U. S. 241, 248 (1886). Since then, however, the jurisprudence of habeas corpus has followed a zigzag course. As Justice Harlan said of another line of cases, habeas cases are "almost as difficult to follow as the tracks of a beast of prey in search of its intended victim." *Mackey, supra*, 401 U. S., at 676.³ It is best to begin a search for consistency with a review of the purposes of collateral review.

3. Various versions of the history may be found in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 483-507 (1963); W. Duker, *A Constitutional History of Habeas Corpus* (1980); *Stone v. Powell*, 428 U. S. 465, 474-482 (1976); and *Fay v. Noia*, 372 U. S. 391, 408-426 (1963). See also Oaks, *Legal History in the High Court — Habeas Corpus*, 64 Mich. L. Rev. 451 (1966) (challenging the historical veracity of *Fay v. Noia*).

B. Purposes of Collateral Review.

There have been a number of proposals to restrict the availability of collateral review and some vehement assertions that we should leave it untouched. Each proposal for change and each opposition to change is based on assumptions about the purposes of habeas corpus.

1. Forcing courts to toe the mark.

The traditional view of the principal purpose of habeas corpus as a collateral attack is that stated by Justice Harlan in *Mackey, supra*, 401 U. S., at 687: "The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts . . . to toe the constitutional mark."

This function of habeas corpus was unnecessary when Congress first extended federal habeas to state prisoners. Section 2 of the same act gave convicted prisoners a right to review of their federal questions in this Court by writ of error. Act of Feb. 5, 1867, ch. 28 § 2, 14 Stat. 385, 386. This right remained intact until the "Judge's Bill" of 1925 gave the Court discretionary review in most such cases. See generally R. Stern, et al., *Supreme Court Practice* 188-190 (6th ed. 1986). "[W]ith the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154 (1970). Since *Brown v. Allen*, 344 U. S. 443 (1953), it has generally been the rule that the prior state decision on a question of federal constitutional law carries no weight in federal habeas court. *Id.*, at 507 (opinion of Frankfurter, J.).

This deputizing of the lower federal courts as mini supreme courts, with the power to set aside state supreme court decisions on the basis of mere disagreement, has problems of its

own, however. Who is forcing the habeas courts to toe the mark? Who keeps *them* in line when they violate the right of the state to structure its criminal justice system as it sees fit, subject only to *genuine* constitutional restrictions? This Court must do so. See, e.g., *Harris v. Pulley*, 692 F. 2d 1189 (9th Cir. 1982), *rev'd* 465 U. S. 37 (1984); *Adamson v. Ricketts*, 789 F. 2d 722 (9th Cir. 1986), *rev'd* 483 U. S. 1 (1987).

When this Court cannot take the case, a direct conflict between two coordinate judicial systems goes unresolved. In *State v. Vickers*, 768 P. 2d 1177, 1188, n. 2 (Ariz. 1989), for example, the Arizona Supreme Court refused to follow *Adamson v. Ricketts*, 865 F. 2d 1011 (9th Cir. 1988), cert. pending *Ricketts v. Adamson*, 88-1553. This is a most unseemly situation.

2. Correcting fundamentally unjust incarcerations.

The oldest and most important purpose of habeas corpus is to set free those prisoners who have done nothing illegal. The celebrated *Bushell's Case*, 124 Eng. Rep. 1006 (1670), for example, freed a juror held in contempt for bringing in the "wrong" verdict. The concept of jurisdiction was first expanded beyond its usual meaning to cover cases where the defendant had been convicted of violating an unconstitutional statute and was therefore actually innocent of any crime. See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880). The early habeas cases on procedural claims involved circumstances raising grave doubt whether the defendants were actually guilty. See, e.g., *Moore v. Dempsey*, 261 U. S. 86, 91 (1923) (mob-dominated trial).

The governing statute has long required the habeas court to "dispose of the matter as law *and justice* may require." 28 U. S. C. § 2243 (*italics added*). Thus "the imperative of correcting a fundamentally unjust incarceration," *Engle v. Isaac*, 456 U. S. 107, 135 (1982), is rightly assuming an increasing importance in habeas jurisprudence. Conversely, as we will describe in part C, below, rules which would overturn fundamentally *just* incarcerations on procedural grounds are coming under increasing scrutiny.

3. Giving every defendant a federal forum.

One reason often asserted against limitation of habeas corpus is the contention that every defendant should have the opportunity to litigate his federal questions in a federal forum. See, e.g., Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 464 (1960). This position is founded on a deep distrust of state courts. *Ibid.* It asserts, in essence, that state courts are totally incompetent to adjudicate federal questions.

Our judicial system simply is not structured that way. It has been understood from the very beginning that state courts could pass on federal questions. *The Federalist* No. 82 (A. Hamilton). The desire for a federal forum, by itself, is insufficient to justify collateral attack on final convictions. A federal forum may be necessary where state remedies are grossly inadequate, as they may have been thirty years ago. See generally Reitz, *supra*. The contention that federal court resolution of every federal issue is essential today, however, is unsupportable.⁴

4. Guaranteeing perfection.

A fourth possible purpose of collateral review is to guarantee that no one is punished without a perfect trial. "But [this] Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann v. Wilson*, 477 U. S. 436, 447 (1986) (plurality).

The "perfect trial" view obviously cannot be accepted in its extreme form, for otherwise every case would be infinitely re-litigable. If convictions are ever to be final, we must at some point accept the proposition that some claims will no longer be considered. The unanimous decision of this Court in *United States v. Timmreck*, 441 U. S. 780 (1979) establishes this prin-

4. See *infra*, pp. 18-21.

ciple unequivocally. The question, then, is not *whether* to accept the possibility of imperfection, but only *where* to draw the line.

A slightly less extreme version of the perfection argument is to apply it only to capital cases under the threadbare battle flag proclaiming that "death is different." The fallacy here is exposed by comparing two hypothetical prisoners. The first has been sentenced to life in prison for a crime he may not have committed. The second has been sentenced to death for a crime he certainly committed but for which the death penalty may arguably not be "appropriate." Which case carries the potential for greater injustice?

All but the most extreme opponents of capital punishment would have to agree that imprisoning an innocent man for life is a greater injustice than executing *any* person who is actually guilty of willful, deliberate, premeditated murder. Yet the "death is different" brigade would have us devote *more* resources to relitigating the penalty phase of capital cases than we devote to reexamining the guilt phase of noncapital cases. The American Bar Association, for example, contends that any claim that a given procedure "lessens the integrity of sentencing determinations," apparently to *any* degree, should qualify for the second *Teague* exception. Brief for American Bar Association as Amicus Curiae ("ABA Brief") 10.⁵

5. It is worth noting here that the position set forth in that brief does *not* represent a consensus of the American bar. The ABA's task force, the Criminal Justice Section, the ABA's membership, and American attorneys as a whole are deeply divided on this subject. California Chief Justice Malcolm M. Lucas, co-chairman of the task force, wrote a dissent to the report. On page 19 of the dissent, he specifically rejects the majority's criticism of *Teague*. Chief Justice Lucas is uniquely qualified to address the problem of federal habeas for state prisoners, having served thirteen years as a federal district judge before joining the California Supreme Court. His dissent was joined on this point by District Judge Barefoot Sanders and endorsed in its entirety by eight members of Criminal Justice Section council. Report and Recommendations of the ABA Criminal Justice Section to the ABA

Once a person has been found guilty beyond a reasonable doubt, the choice of sentence within the allowable range of sentences for the offense is necessarily a "judgment call." Reasonable people will always differ as to what sentence is appropriate. Eleven percent of the American people oppose capital punishment in all murder cases; 29 percent favor it in all murder cases. U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Statistics — 1988*, at 230. Sentence choice within the allowable range can therefore *never* result in a miscarriage of justice of the magnitude of the lengthy imprisonment of an innocent person. The contention that we should give the sentencing determination a lesser degree of finality than the guilt/innocence determination receives is wholly without merit.

C. Limitations on Collateral Review.

1. Pre-*Teague* limitations.

Each of the limitations that this Court has adopted has accommodated the enforcement and correction of injustice purposes and rejected the federal forum and perfection rationales.

Stone v. Powell, 428 U. S. 465, 490-491, nn. 30, 31 (1976) recognizes that the exclusionary rule has no relevance to actual innocence and hence habeas review of such claims does not further the injustice correction purpose. *Stone* emphatically rejects the contention that a federal forum is required. *Id.*, at 493, n. 35. It accepts the possibility of imperfection at trial. The requirement is full and fair litigation, not absolute correctness. *Id.*, at 494-495. The enforcement purpose is not explicitly discussed, but presumably an outright defiance of clearly controlling precedent by the state court would not constitute full and fair litigation.

...Continued...

House of Delegates A70-A72 (1989) ("ABA CJS Report").

The procedural default rule of *Wainwright v. Sykes*, 433 U. S. 72 (1977) implicitly recognizes that when the trial judge's failure to rule on a question is due to defendant's own failure to raise it, there is no need for the enforcement function. See *id.*, at 91. However, the "actual innocence" exception carved out in *Murray v. Carrier*, 477 U. S. 478 (1986) recognizes the importance of the correction of injustice. Under *Sykes*, imperfections not objected to are usually tolerated, and they are generally not litigated on the merits in any forum, state or federal.

2. Partially adopted proposals.

Three proposed limitations on federal habeas are worth mentioning for the light they shed on the broader problem. Professor Bator's extensive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963), is devoted primarily to demonstrating that relitigation *de novo* on federal habeas is unjustified. He concludes with a recommendation that federal habeas courts consider actual guilt or innocence as an important, if not determinative, factor in deciding whether habeas relief ought to be granted. *Id.*, at 528.

Judge Henry Friendly spoke more directly to the same point. He proposed that "with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence. . . ." before habeas relief could be granted. Friendly, *supra*, 38 U. Chi. L. Rev., at 150.

Neither proposal has been adopted for the first federal review. For successive petitions, however, Judge Friendly's view has been endorsed by a four-Justice plurality of this Court, *Kuhlmann v. Wilson*, 477 U. S. 436, 454 (1986), with Justice Stevens indicating that guilt or innocence should be considered in the judge's discretion, *id.* at 476-477, along the lines of Professor Bator's proposal.

The partial acceptance and partial rejection of these innocence-driven proposals indicate that innocence is relevant but that there is a continuing need for the enforcement function as

well. A mechanism is needed to correct state court disobedience of controlling precedent, even in the case of clearly guilty defendants. It is most unlikely, however, that such disobedience would go uncorrected on the first federal petition.

A different but equally substantial reform was proposed by Justice Stevens in his dissent in *Rose v. Lundy*, 455 U. S. 509 (1982). Justice Stevens divided constitutional claims into four categories: meritless claims, harmless errors, reversible but nonfundamental errors, and fundamental errors. *Id.*, at 543-544. The last category is described primarily by examples. *Id.*, at 544, nn. 9-11. The third category includes all claims under rules which had been held nonretroactive under the since-discarded test of *Linkletter v. Walker*, 381 U. S. 618 (1965). *Id.*, at 543, n. 8. These claims, said Justice Stevens, should not be grounds for habeas relief *at all*. *Ibid.*

Like the Friendly and Bator proposals, this one is aimed at preserving habeas for the innocent, but in a less direct manner. It excludes by category those claims of error which are unlikely to result in the conviction of an innocent person, rather than by examining guilt or innocence in the individual case.

The separation of constitutional claims into the categories suggested by Justice Stevens would reject the implicit holding of *Brown v. Allen* that constitutional claims are fundamentally different as a category from other claims. Instead, constitutional claims would be subject to inquiry as to whether the claimed violation is fundamental, similar to the inquiry presently made for nonconstitutional claims. Compare *Davis v. United States*, 417 U. S. 333, 346 (1974) with *United States v. Timmreck*, 441 U. S. 780, 784 (1979). Those not meeting the test would not be grounds for collateral relief.

3. *Teague* and *Butler*.

In this broader context, *Teague* can be seen as part of a larger effort to preserve the enforcement and injustice-correcting functions of habeas corpus while applying some limits

to the relitigation of the reasonable decisions of the appellate courts.

Teague v. Lane, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)⁶ is the culmination of this Court's long and difficult struggle with the question of how far back a new decision should reach in undoing the work of judges, lawyers, and juries who had duly obeyed the rules in effect at the time. Whenever a rule is not applied retroactively, the contention is made that the Court has sanctioned a constitutionally flawed conviction or denied someone his constitutional rights. See, e.g., *Johnson v. New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., dissenting). That would be true if one subscribed to the Blackstonian belief that the Court merely discovers pre-existing law and does not make new law. See 1 W. Blackstone, *Commentaries* 69-70 (1765). However attractive the Blackstone approach may be in theory, though, it loses any connection with reality when applied to requirements as far removed from the text and history of the Constitution as the *Miranda* warnings, the exclusionary rule, or the detailed code of capital sentencing procedure which has been promulgated under the name of the Eighth Amendment.

The first step in a *Teague* analysis is to determine whether a rule is "new." "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349. The examples given by the *Teague* court illuminate the meaning of this sentence. *Rock v. Arkansas*, 483 U. S. 44 (1987) broke new ground by extending the right to present a defense, established in *Chambers v. Mississippi*, 410 U. S. 284 (1973), into the previously uncharted territory of hypnotically refreshed testimony. *Ford v. Wainwright*, 477 U. S. 399 (1986) imposed a new obligation on the states by constitutionalizing the long-established common-law prohibi-

6. *Teague* is a plurality opinion, but its rule was accepted by a majority in *Penry v. Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 274 (1989).

tion of execution of the insane.⁷ Neither of these rules was a bolt from the blue. Both rules were derived from the principles established in prior cases.

The *Teague* court's alternative formulation of newness is more emphatic. "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349 (*italics in original*). Because no precedent existing at that time of *Teague*'s direct appeal could be said to dictate that the fair cross-section requirement extended to the petit jury, such an extension would be a new rule. *Ibid.*

This definition of "new rules" is considerably narrower than the one which can be gleaned from the thoughts haltingly advanced by Justice Harlan in his dissent in *Desist v. United States*, 394 U. S. 244, 263-265 (1969). Justice Harlan was reluctant to invoke nonretroactivity in cases where "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." *Desist, supra*, at 264. *Teague* draws the line on the opposite side of this gray zone, denying habeas relief if the result was not dictated by existing precedent.

If there had been any doubts whether *Teague* meant what it said, they were erased in *Butler v. McKellar*, 88-6677 (March 5, 1990). The case involved the retroactivity of *Arizona v. Roberson*, 486 U. S. 675 (1988). *Roberson* held that the prohibition against renewed police questioning after invocation of the right to counsel, *Edwards v. Arizona*, 451 U. S. 477 (1981), applies to a statement about an unrelated offense made voluntarily and after appropriate warnings. *Butler*'s case had become final after *Edwards* but before *Roberson*. *Butler, supra*, slip op., at 3-4.

7. Petitioner's contention that *Ford* is cited as "new rule" because it supposedly overruled a prior case, Petitioner's Brief 31, is contrary to the plain language of *Ford* itself. See 477 U. S., at 405.

The court accepted for the sake of argument Butler's contention that *Roberson* was "within the 'logical compass' " of *Edwards* and possibly even "controlled" by it. Yet this was not determinative of the *Teague* "new rule" question. *Id.*, slip op., at 7. The Court noted "a significant difference of opinion on the part of several lower courts" and further noted that "*Roberson* was susceptible to debate among reasonable minds." *Ibid.* "It would not have been an illogical or even grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a 'new rule.' " *Id.*, slip op., at 7-8.

The rationale of *Butler* further confirms that *Teague* was a fundamental rethinking of the scope of habeas corpus. "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.*, slip op., at 6.

The dissent reads *Butler* as turning away from the mandate of *Brown v. Allen*, 344 U. S. 443 (1953). "It has long been established, therefore, that federal habeas proceedings ought not accord *any* deference to state court's constitutional ruling under collateral attack." *Id.*, slip op., at 12 (Brennan, J., dissenting) (*italics added*) (citing *Brown*).⁸ That reading is partially correct.

The rule that emerges from *Teague* and *Butler* is a combination of the deference to the prior decision that existed before *Brown v. Allen* and Justice Stevens' thesis that "claims of constitutional error are not fungible" for the purpose of determin-

8. That was indeed the law for a substantial time, the 23 years from *Brown* until *Stone v. Powell*, 428 U. S. 465 (1976). However, it was *not* the law for a longer time before that. "Where the state courts have considered and adjudicated the merits of his contentions, . . . a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944); see also *Frank v. Mangum*, 237 U. S. 309, 334 (1915); *Schechtman v. Foster*, 172 F. 2d 339, 341 (2nd Cir. 1949) (Hand, J.).

ing whether collateral attack is warranted. See *Rose v. Lundy*, 455 U. S. 509, 543-544 (1982) (dissent). The *Lundy* dissent would cut off habeas review for nonfundamental claims and preserve full, unencumbered habeas review for the fundamental claims. *Ibid.* The *Teague-Butler* rule separates the fundamental from the nonfundamental claims, and then considers the nonfundamental claims only on the ground that the state court refused to reach a result *dictated* by then-existing precedent, effectively deferring to any reasonable resolution of then-unresolved questions.

The two *Teague* exceptions serve to separate constitutional claims into the two categories. The first exception is substantive and addresses innocent conduct and excessive punishment. A person convicted for burning the flag in protest before *Texas v. Johnson*, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), for example, could nonetheless obtain habeas relief. See *Teague*, 109 S. Ct., at 1075, 103 L. Ed. 2d, at 356. A person convicted of rape but not murder whose sentence of death was final before *Coker v. Georgia*, 433 U. S. 584 (1977) could also obtain relief from a sentence which exceeds the maximum for his conduct. See *Penry v. Lynaugh*, 109 S. Ct. 2934, 2952, 106 L. Ed. 2d 256, 285 (1989).

The second *Teague* exception focuses on procedure rather than substance, yet it retains a strong connection with actual innocence. "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness *and accuracy* of the criminal proceeding." *Saffle v. Parks*, 88-1264, slip op., at 10 (March 5, 1990) (*italics added*). The *Teague* court went out of its way to emphasize the injustice-correcting function of habeas review, modifying the rule as proposed by Justice Harlan "by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 109 S. Ct., at 1076-1077, 103 L. Ed. 2d, at 358.

This second exception is similar to the *Lundy* dissent's fourth category, and *Teague* quotes the description of that category. *Ibid.* The *Lundy* dissent cites three cases as examples of this category, 455 U. S., at 544, nn. 9-11, and it is no

coincidence that *all* of these cases are over a half-century old. This Court has been scrutinizing state criminal procedures for a very long time. With the exception of *Gideon v. Wainwright*, 372 U. S. 335 (1963), the truly fundamental problems which raised substantial danger of convicting innocent people were all dealt with under the Due Process Clause, without the need for the incorporation doctrine.

The *Teague* plurality's observation that "we believe it unlikely that many such components of basic due process have yet to emerge," 109 S. Ct., at 1077, 103 L. Ed. 2d, at 358, is a cautious understatement. It is unlikely that any have emerged in many years.⁹

D. Categories of Claims.

Teague, *Butler*, *Stone v. Powell*, 428 U. S. 465 (1976), *Davis v. United States*, 417 U. S. 333 (1974), and *United States v. Timmreck*, 441 U. S. 780 (1979) leave us with the following stratification of claims of error of law in cases where the objection has been timely raised on direct appeal and rejected there:¹⁰

1. Claims that the act is not criminal or that the punishment is *per se* constitutionally excessive. [The first *Teague* exception.]
2. Claims that a fundamental procedural requirement, without which the likelihood of an accurate conviction is seriously diminished, has not been met. [The second

9. Space does not permit a full explanation of why *Penry v. Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) does not alter the rule. This argument was presented in our brief in *Selva v. Collins*, 87-6700, at 15-17. In addition, *Saffle v. Parks*, 88-1264, slip op., at 7-8 (March 5, 1990) disposes of the contention.

10. This classification does not consider factual disputes, procedural default, or the exhaustion rule.

Teague exception.]

3. All constitutional claims not falling in categories 1, 2, or 4.
4. Exclusionary rule claims. [*Stone v. Powell*, *supra*.]¹¹
5. All nonconstitutional claims not falling in categories 1 or 2.

These categories form a graduated scale of review on habeas corpus. Just as all equal protection claims do not receive the same degree of scrutiny, even though they are all constitutional claims, see, e.g., *Plyler v. Doe*, 457 U. S. 202, 216-218 (1982), so all criminal procedure claims should not receive the same review on habeas. The claims are not fungible; they are ranked in the order of the likelihood that noncompliance would result in injustice.

The first category receives full *de novo* review. A violation here is *per se* an injustice. The second category also receives full *de novo* review. Although an unjust result is not a certainty, it is a high enough probability to overcome the otherwise compelling interest in finality.

The third category involves claims where the probability of injustice is substantially attenuated. Given the greatly reduced need for the injustice-correcting function of habeas corpus, the new structure generally trusts the state court to resolve unsettled questions responsibly. The enforcement function of habeas requires that the judgment be set aside if the state court fails to make a "reasonable, good-faith interpretation[] of existing precedents," *Butler*, *supra*, slip op., at 6, but otherwise the state court judgment stands. In that event, we are back to the common law rule. "The law trusts that court with

11. This category may include some prophylactic rule claims as well. See *Duckworth v. Eagan*, 109 S. Ct. 2875, 2881, 106 L. Ed. 2d 166, 179 (1989) (O'Connor, J., concurring).

the whole subject, and has not confided to [the habeas] court the power of revising its decisions." *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 207 (1830).

In the fourth category, full and fair litigation in the state court precludes habeas review. The complete irrelevance of the claim to actual innocence precludes interference on habeas in all but the most extreme cases. In the fifth category, nonfundamental statutory claims, collateral attack is not allowed.

E. Objections to the Categories of Claims.

Justice Brennan has objected from the very beginning that the separation of constitutional claims into categories is illegitimate because Congress has allegedly mandated full *de novo* review of all questions of federal constitutional law. *Stone v. Powell*, 428 U. S. 465, 529 (1976) (Brennan, J., dissenting). The most succinct answer may be found in *Rose v. Lundy*, 455 U. S. 509, 548, n. 18 (1982) (Stevens, J., dissenting). The precedent to the contrary in *Stone* is now fourteen years old, and contrary precedents older than *Brown v. Allen* have previously been noted.¹² An appeal to *stare decisis* which looks only at precedents from 1953 to 1975, and not at those before and since, rings a bit hollow. The broad scope of habeas review was created judicially. The legitimacy of contracting it judicially in the absence of any clear word from Congress¹³ should, by this point, be beyond question.

A second, institutional objection is that the lower federal courts will be shut out of the process of developing constitutional doctrine. See, e.g., Brief for NAACP Legal Defense and

12. See *supra*, note 8, at p. 14.

13. The *Stone v. Powell* question was placed before Congress when it considered the habeas rules. It decided not to decide. H. R. Rep. No. 1471, 94th Cong., reprinted in 1976 U. S. Code Cong. & Adm. News 2478, 2479.

Education Fund as Amicus Curiae ("NAACP Brief") 34-36. This objection is utter nonsense. The escalating war on drugs and the resulting increase in federal criminal cases will give the federal courts more than enough grist for their mills, if it does not bury them altogether. Capital cases will have their place in this workload. See 21 U. S. C. § 848(e) (federal death penalty for drug-related murders.)

What the federal courts of appeals will *not* be doing is establishing precedents which are binding *de facto* on courts which they have no authority to bind *de jure*. See 1B J. Moore, et al., *Moore's Federal Practice* ¶ 0.402[1] at 23 (2nd ed. 1988) (state courts not bound by circuit precedent). " 'Tis a consummation devoutly to be wished." W. Shakespeare, *Hamlet*, act III, scene i (1600).¹⁴

A third, more policy-oriented objection concerns the effect of lowered habeas scrutiny on state court decision-making. "Because state courts need not fear federal habeas so long as they avoid clearly unreasonable constructions of existing doctrine, they will have *no incentive* to reflect carefully about existing legal principles and thereby to develop novel and more sophisticated understandings of constitutional guarantees." *Butler v. McKellar*, 88-6677, slip op., at 15, n. 12 (Brennan, J., dissenting) (March 5, 1990) (*italics added*). See also NAACP Brief 34.

This statement lays bare the fundamental assumption which lies at the root of the deep and bitter division over habeas corpus. One can easily understand why persons who hold such a dismally low opinion of state court judges would be aghast at a law which "trusts that court with the whole subject." This statement paints a picture of state judiciaries which are utterly devoid of any sense of responsibility or of any duty to the Constitution and which are motivated solely by the desire to avoid grants of habeas corpus.

14. See *supra*, pp. 5-6.

Brown v. Allen, 344 U. S. 443, 477 (1953) was a racial discrimination case which arose in North Carolina in 1949. At that time, and under those circumstances, a low opinion of state courts may well have been justified. But this is 1990. An entire generation of lawyers has been educated, has practiced, and has reached the prime of their careers in an atmosphere of respect for civil rights and civil liberties. These are the people who now sit on the benches of our state courts. The assumption that nothing but habeas corpus restrains them from seething hostility to constitutional rights is unwarranted, unfair, and untrue.

Last summer, the Criminal Justice Legal Foundation did a study of capital habeas corpus cases in the Eleventh Circuit. Out of 71 cases that represented that court's last word on the merits there were 28 grants and 43 denials. Scheidegger, *Rethinking Habeas Corpus* 34 (1989).¹⁵ The most striking finding was that there was *not one single case* of a federal claim which was timely presented to the state courts and unreasonably rejected by them. *Ibid.* Furthermore, only one successful habeas petitioner had even a colorable claim that he did not kill the victim. *Id.*, at 38.¹⁶ Only one of the remaining 27 presented evidence which could be described as compelling grounds for mercy. *Id.*, at 40.¹⁷

The study reached these conclusions, among others:

- "1. The state supreme courts are conscientiously applying the precedents of the United States Supreme Court. Every capital defendant who properly presents his

15. This paper is not yet available in published form. Copies have been lodged with the clerk and furnished to counsel.

16. Counsel for amicus is informed that this petitioner pleaded guilty to noncapital murder on retrial.

17. Whether the grounds were compelling even in that case depends on whether one accepts the evidence presented in the habeas hearing or the evidence presented at sentencing. *Id.*, at 40, n. 326.

claim receives a decision following those precedents, as interpreted within limits in which reasonable judges may differ.

* * *

- "3. Federal habeas corpus is almost never employed to correct fundamentally wrong results. Almost all of the cases involve well-deserved sentences for horrible crimes." *Id.*, at 43 (footnotes omitted).

The effect of *Teague* on state courts is likely to be the opposite from the one envisioned by its detractors. It removes an impediment to state court responsibility. "I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, 76 Harv. L. Rev., at 451. Indeed, the contrary argument is an exceptionally peculiar one to make in a *Caldwell* case. The argument assumes that *de novo* review will have an effect on the state courts which is precisely the opposite of the effect which the *Caldwell* court asserted reviewability would have on the jury. See *Caldwell v. Mississippi*, 472 U. S. 320, 330-333 (1985).

Finally, the validation of reasonable, good-faith resolution of undecided federal questions largely removes the powerful disincentive for state courts to reach the merits which *Brown* injected into the law of habeas corpus 37 years ago. State court rejection of a federal claim on procedural grounds will generally be respected by federal courts, *Wainwright v. Sykes*, 433 U. S. 72 (1977), but until *Teague-Butler* the state court ruling on the merits of a question of law received no respect.

"I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none." *Brown v. Allen*, *supra*, 344 U. S., at 552 (Black, J., dissenting). *Teague-Butler* provides the state courts with some assurance that they can proceed to the merits

of unresolved questions of law without opening their decision to endless second-guessing on habeas corpus.

The multi-tiered system of habeas review established by *Stone*, *Teague*, and *Butler* is a rational, responsible accommodation to the changing needs of a changing nation. The growing confidence in state courts is justified. The objections are without merit. These cases are good law and sound policy.

II. Petitioner seeks to apply two "new rules" on habeas corpus.

Petitioner asserts that *Caldwell v. Mississippi*, 472 U. S. 320 (1985) is not a "new rule" within the meaning of *Teague v. Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The reasons given are that *Caldwell* was "a predictable development," Petitioner's Brief 12, and "both predictable and unexceptional," *id.*, at 15. "The essence of *Teague*," petitioner says, "is that a federal court must consider how the state courts would have viewed a *Caldwell* issue at the time Robert Sawyer's conviction became final." *Id.*, at 28.

This contention is flatly contrary to the plain language of *Teague* that new rules are those not *dictated* by existing precedent. 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349. The question is not how states *would* have viewed a *Caldwell* issue but rather how they were *required* to view a *Caldwell* issue. If reasonable judges faithfully applying existing precedent could differ, the decision is final when it is final.

If there had been any doubt that petitioner's interpretation of the *Teague* requirement was incorrect, it was erased by the decision in *Butler v. McKellar*, 88-6677, slip op., at 6-8 (March 5, 1990). Not only is *Caldwell* a new rule, but the extrapolation which petitioner seeks to make from *Caldwell* would be an additional new rule.

Petitioner goes to considerable length to demonstrate that *Caldwell* is an independent product of the "procedurally cruel

and unusual punishment"¹⁸ jurisprudence created after *Furman v. Georgia*, 408 U. S. 238 (1972) and not an outgrowth of prior due process law on prosecutor argument, *Donnelly v. De Christoforo*, 416 U. S. 637 (1974). Petitioner's Brief at 28-34. This characterization of *Caldwell* is quite right and totally undermines petitioner's position.

The law of capital punishment was plunged into chaos by *Furman* and the rapid rewriting of statutes which followed it. The sudden appearance of strict procedural requirements in a constitutional provision previously thought to have only substantive content left a great many questions unanswered. Most of these questions dealt with the degree of discretion the jury was required or permitted to have and the factors the jury may or must consider in exercising that discretion. See, e.g., *Gregg v. Georgia*, 428 U. S. 153 (1976); *Lockett v. Ohio*, 438 U. S. 586 (1978). These cases involve analysis of statutes and jury instructions to determine if the state had structured its capital sentencing system in such a way as to successfully navigate the narrow channel between the arbitrariness condemned in *Furman* and the rigidity condemned in *Woodson v. North Carolina*, 428 U. S. 280 (1976). These issues were far removed from questions of the propriety of prosecutors' arguments.

The last full hearing on direct review in this case was *Sawyer v. State*, 442 So. 2d 1136, decided November 23, 1983. A mere two weeks before, this Court vacated a stay of execution in a case presenting a virtually identical claim: *Maggio v. Williams*, 464 U. S. 46 (1983).

The prosecutor's argument in *Williams* is quoted extensively in Justice Stevens' concurrence. 464 U. S., at 53-54. It is similar to the one in the present case. The majority found that

18. Amicus uses this admittedly awkward term to refer to rules of law that deem a given punishment for a given crime by a given defendant either "cruel and unusual" or not depending on the procedure by which that punishment is determined. The resemblance to "substantive due process" is more than skin-deep.

the "contention[] warrant[s] little discussion." *Id.*, at 49. While the claim might have been dismissed on abuse of the writ grounds, "the District Court nevertheless gave it full consideration Applying the standard established in *Donnelly v. De Christoforo*, 416 U. S. 637 (1974), the District Court examined the prosecutor's closing argument at length and concluded that it did not render Williams' trial fundamentally unfair." *Id.*, at 49-50. The majority summed up by saying

"The District Court's careful opinion was fully reviewed by the Court of Appeals, which found no basis for upsetting the District Court's conclusion that Williams' contentions were meritless. *The arguments that Williams raised for the first time in these proceedings are insubstantial*, and the arguments that he has attempted to relitigate are no more persuasive now than they were when we first rejected them. We conclude, therefore, that the stay entered by the Court of Appeals should be vacated." *Id.*, at 52 (italics added).

Williams is not a ruling on the merits of the prosecutor's argument. However, it is certainly a very strong implication that *Donnelly* was, at that time, the correct standard for determining whether a prosecutor's argument violated any federal right and that the Eighth Amendment had not yet reached out to govern such arguments. The Court was well aware of the considerations which later formed the basis of *Caldwell*. They are clearly stated in the concurrence. *Id.*, at 54-55 (Stevens, J., concurring in the judgment). Yet the majority found the argument "insubstantial."

When *Caldwell* was decided, it broke new ground by extending the Eighth Amendment to an area formerly regulated only by the Due Process Clause and state law. *Caldwell* is a new rule.

Not only is *Caldwell* a new rule, but the rule petitioner would make in this case is new beyond *Caldwell*. In the pre-*Teague* panel decision of the Fifth Circuit in this matter, *Sawyer v. Butler*, 848 F. 2d 582 (1988), the majority applied *Caldwell* as the controlling precedent and found the present case distinguishable. *Id.*, at 595-599.

The prosecutor's argument in this case has been found not to require reversal in post-*Caldwell* rulings by (1) the district court magistrate, 848 F. 2d, at 587; (2) the district judge, *ibid.*; and (3) the court of appeals panel majority, *id.*, at 599.¹⁹ "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents . . ." *Butler v. McKellar*, *supra*, slip op., at 6. Are all three of these interpretations unreasonable or in bad faith? If not, the rule petitioner seeks is "new" beyond *Caldwell*.

III. *Caldwell* is not within the second *Teague* exception.

The final, and dispositive, question is whether the rules sought to be applied here are " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 88-1264, slip op., at 10 (March 5, 1990). Justice Stevens has already answered a very similar question in the negative. *Maggio v. Williams*, 464 U. S. 46, 55-56 (1983) (concurring in the judgment). The same answer should be given in this case.

There does not yet exist much concrete guidance on the second exception. The generality of the wording in *Teague* lends itself to radically different interpretations, particularly in an area of the law where opinion runs as strongly as it does on capital punishment.

Concrete guidance on this point is more urgently needed in the penalty phase than elsewhere, but giving it is also more difficult. Most people can agree on what accuracy in guilt determination means, if not on how to achieve it, but the question of the appropriate punishment for a premeditated murder is *always* a matter of opinion.²⁰ It is difficult to speak of

19. The principal state habeas opinion predates *Caldwell*. J. A. 74-86.

20. See *supra*, p. 9.

"accuracy" when the target is so diffuse that we can never agree on whether the bull's-eye has been hit.

Several possibilities suggest themselves. One is to hold *Teague* itself inapplicable to the penalty phase under the "death is different" theory. That path has been rejected in *Penry v. Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 275-276 (1989) and *Saffle v. Parks*, 88-1264 (March 5, 1990).

The opposite answer would be to apply the second *Teague* exception literally and therefore hold it to be *per se* inapplicable to the penalty phase. Procedures which follow the verdict of guilt and go only to penalty are necessarily not "procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague v. Lane*, 109 S. Ct. 1060, 1076-1077, 103 L. Ed. 2d 334, 358 (1989).

A middle course can be charted by taking one step back and asking what question in the penalty phase is analogous to the "accurate conviction" question in the guilt phase. Accuracy of conviction is the fundamental purpose of the trial. It is the principal reason for the entire elaborate set of rules that make up the law of criminal procedure. Procedures within the second *Teague* exception are those without which the entire proceeding is derailed and rendered unable to proceed reliably to its goal, not merely those which might have some detrimental effect.

The fundamental purpose of modern capital sentencing procedures is avoidance of the arbitrariness condemned in *Furman v. Georgia*, 408 U. S. 238 (1972). *Furman* was not granted relief because death is a necessarily cruel punishment or because it was necessarily disproportionate to his crime. Instead, relief was granted because the systems then in place lacked any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313 (opinion of White, J.). A "bedrock procedural element" of the penalty phase, amicus submits, is one without which the state's sentencing system as a whole lacks that meaningful basis.

With any discretionary selection process, there will be some cases which obviously warrant selection, some which obviously do not, and some which fall into a midrange. See *McCleskey v. Kemp*, 481 U. S. 279, 287, n. 5 (1987). Within this midrange, the result will turn on random factors, such as the personal views of the jurors selected for the particular case, or perhaps even on illegitimate factors such as the race of the victim. Unpredictability and discrepancies within the midrange are an inevitable result of discretionary sentencing. See *id.*, at 311-313. The only way to escape such results would be to require the mechanical sentencing which this Court has prohibited. See *Sumner v. Shuman*, 483 U. S. 66, 85 (1987).

A procedure which merely has a possible impact one way or the other in a close case is thus insufficient to raise a grave danger of returning the state's sentencing system to pre-*Furman* arbitrariness. To present such a danger, the procedure must be one which is likely to regularly produce death sentences at the low end of the range of culpability, i.e., in cases where there should be a consensus that death is not the appropriate punishment.

The clearest example is *Furman* itself. In the complete absence of articulated standards for sentencing, there was grave danger that defendants at the low end of the range of culpability were being selected on the basis of illegitimate factors, especially race. Two of the petitioners in *Furman* were Black men convicted only of rape, not murder. 408 U. S., at 252-253 (opinion of Douglas, J.). This Court's pre-*Furman* cases contain even worse examples of shockingly disproportionate sentences. See, e.g., *Boykin v. Alabama*, 395 U. S. 238, 239-240 (1969) (robber with no prior offenses).

A second example is furnished by *Woodson v. North Carolina*, 428 U. S. 280 (1976). *Woodson* involved a sweeping statute with a mandatory death penalty for all first-degree murderers. The plurality recognized that this statute would not be enforced as written, and widespread jury nullification in low-range cases was inevitable. *Id.*, at 291-296. Many low-range cases would still result in death sentences under such a proce-

ture, however, as many juries would believe they had no choice.

The third, and perhaps last, of the fundamental rules of the post-*Furman* law of sentencing can be found in Justice Blackmun's concurrence in *Lockett v. Ohio*, 438 U. S. 586, 615-617 (1978). The Ohio statute allowed consideration of only three, narrow mitigating circumstances, which did not include two circumstances universally regarded as powerfully mitigating: minor accomplice status and lack of intent to kill. *Id.*, at 613. This system produced a death sentence in what was quite obviously a low-range case, and it carried a grave risk of doing so in many other similar cases. Justice Blackmun noted that these two mitigating circumstances, at least, must be considered. *Id.*, at 615-617. However, he was unwilling to join in the sweeping rule announced by the plurality. *Id.*, at 613.

A prime example of a nonfundamental rule is the one announced by the *Lockett* plurality, to the extent that it requires consideration of circumstances which most people would consider either not mitigating at all or entitled to relatively little weight as compared to the circumstances generally set forth in statutory lists. See, e.g., Model Penal Code § 210.6 (4), reprinted in 2 W. La Fave & A. Scott, *Substantive Criminal Law* 517-518 (1986). While evidence of good behavior in jail may be relevant and even required, see *Skipper v. South Carolina*, 476 U. S. 1 (1986), that evidence does not transform a mid-range case to a low-range case. The absence of that evidence does not present the grave danger of pre-*Furman* arbitrariness which is fundamentally inimical to the basic purpose of the process.

It is no accident that the fundamental rules noted above were established in the early years of modern capital punishment jurisprudence. In the natural evolution of a body of law, the most basic questions are answered first. The longer a question goes unanswered, the less likely it is to be fundamental and the more likely it is to be "fine tuning." See *Teague*, 109 S. Ct., at 1077, 103 L. Ed. 2d, at 358.

Applying these principles to *Caldwell* and to petitioner's proposed extension of *Caldwell* is straightforward. In *Caldwell v. Mississippi*, 472 U. S. 320 (1985), the Court speculated on various reasons why the argument presented and the trial court's seeming endorsement of it might have a tendency to sway the jury toward a sentence of death. The jurors *might* wish to "send a message" even though they did not believe death to be an appropriate sentence. *Id.*, at 331. They *might* think that a reviewable death sentence released them from responsibility while a nonreviewable life sentence did not. *Id.*, at 332. Reviewability *might* be used in jury deliberations to convince holdout jurors. *Id.*, at 333.

Contrasting these speculative hypotheses with the fundamental defects in cases like *Lockett* dramatically illustrates the difference. *Lockett*'s jurors had only two choices: to return the verdict they did regardless of how strongly they felt that she did not deserve the death penalty or to defy their instructions. In *Caldwell*, all we have is unsupported speculation about what might have happened in the jury room. The chances of any of these things happening in a low-range case where mitigation clearly outweighs aggravation are nil. *Caldwell* is definitely not a fundamental rule of the type contemplated in the second *Teague* exception.

Petitioner's proposed extension of *Caldwell* is even more obviously outside the scope of the exception. The *Caldwell* court found it significant that the trial judge openly agreed with the prosecutor's remarks. 472 U. S., at 339. The Fifth Circuit panel majority in the present case found the lack of such an endorsement significant. 848 F. 2d, at 598. The lack of objection by competent counsel is also highly significant. *Maggio v. Williams*, 464 U. S. 46, 55-56 (1983) (Stevens, J., concurring in the judgment.)²¹

21. The Fifth Circuit panel unanimously rejected the ineffective assistance claim, 848 F.2d, at 588-593. Failure to object to the prosecutor's argument was not among the allegations of ineffectiveness. *Ibid.*

Jurors are not stupid. They know that both lawyers are advocates and both may overstate their cases. The jurors know they are to take their guidance from the judge. *Boyde v. California*, 58 U. S. L. W. 4301, 4305 (March 5, 1990). To assume that they will place more emphasis on the prosecutor's argument about reviewability than they will on the judge's specific direction as to their responsibility adds another layer of speculation on top of *Caldwell*'s already speculative hypotheses.

The Louisiana Supreme Court aptly described this case. "Never before has this court been presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here." *State v. Sawyer*, 422 So. 2d 95, 105 (La. 1982). On these horrible facts, it is difficult to imagine twelve rational people coming to any other conclusion. The punishment imposed in this case is totally just, thoroughly deserved, and long overdue.

Conclusion

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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